



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

**CASE OF KHLAIFIA AND OTHERS v. ITALY**

*(Application no. 16483/12)*

JUDGMENT

STRASBOURG

15 December 2016

*This judgment is final but it may be subject to editorial revision.*



**In the case of *Khlaifia and Others v. Italy*,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luis López Guerra, *President*,  
Guido Raimondi,  
Mirjana Lazarova Trajkovska,  
Angelika Nußberger,  
Khanlar Hajiyev,  
Kristina Pardalos,  
Linos-Alexandre Sicilianos,  
Erik Møse,  
Krzysztof Wojtyczek,  
Dmitry Dedov,  
Mārtiņš Mits,  
Stéphanie Mourou-Vikström,  
Georges Ravarani,  
Gabriele Kucsko-Stadlmayer,  
Pere Pastor Vilanova,  
Alena Poláčková,  
Georgios A. Serghides, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 22 June 2016 and on 2 November 2016,  
Delivers the following judgment, which was adopted on the  
last-mentioned date:

**PROCEDURE**

1. The case originated in an application (no. 16483/12) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Tunisian nationals, Mr Saber Ben Mohamed Ben Ali Khlaifia, Mr Fakhreddine Ben Brahim Ben Mustapha Tabal and Mr Mohamed Ben Habib Ben Jaber Sfar (“the applicants”), on 9 March 2012.

2. The applicants were represented by Mr L.M. Masera and Mr S. Zirulia, lawyers practising in Milan. The Italian Government (“the Government”) were represented by their Agent, Ms E. Spatafora.

3. The applicants alleged in particular that they had been confined in a reception centre for irregular migrants in breach of Articles 3 and 5 of the Convention. They also argued that they had been subjected to a collective expulsion and that, under Italian law, they had had no effective remedy by which to complain of the violation of their fundamental rights.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 27 November 2012 notice of the application was given to the Government. On 1 September 2015, a Chamber of that Section, composed of Işıl Karakaş, President, Guido Raimondi, András Sajó, Nebojša Vučinić, Helen Keller, Paul Lemmens and Robert Spano, judges, and Stanley Naismith, Section Registrar, delivered a judgment declaring, by a majority, the application partly admissible; holding, unanimously, that there had been a violation of Article 5 §§ 1, 2 and 4 of the Convention and no violation of Article 3 of the Convention on account of the conditions in which the applicants were held on the ships *Vincent* and *Audace*; and further holding, by five votes to two, that there had been a violation of Article 3 of the Convention on account of the conditions in which the applicants were held in the Early Reception and Aid Centre (CSPA) of Contrada Imbriacola, and also violations of Article 4 of Protocol No. 4 to the Convention and of Article 13 of the Convention, taken together with Article 3 of the Convention and with Article 4 of Protocol No. 4. The concurring opinion of Judge Keller, the joint partly dissenting opinion of Judges Sajó and Vučinić, and the partly dissenting opinion of Judge Lemmens were appended to the judgment.

5. On 1 December 2015 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73. On 1 February 2016 the panel of the Grand Chamber granted that request.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicants and the Government each filed further written observations on the admissibility and merits of the case.

8. In addition, written comments were received from four associations belonging to the Coordination Française pour le droit d'asile (French coalition for the right of asylum – see paragraph 157 below), and from the Centre for Human Rights and Legal Pluralism of McGill University, the AIRE Centre and the European Council on Refugees and Exiles (ECRE), the President having given them leave for that purpose (Article 36 § 2 of the Convention and Rule 44 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms P. ACCARDO,	<i>Co-Agent,</i>
Ms M.L. AVERSANO, Member of the National Legal Service, Legal expert,	
Ms P. GIUSTI, Ministry of the Interior,	
Ms R. RENZI, Ministry of the Interior,	
Ms R. CIPRESSA, Ministry of the Interior,	<i>Advisers;</i>

(b) *for the applicants*

Mr L. MASERA, Lawyer,	
Mr S. ZIRULIA, Lawyer,	<i>Counsel,</i>
Ms F. CANCELLARO,	<i>Adviser.</i>

The Court heard addresses by Mr Masera, Mr Zirulia, Ms Aversano and Ms Cipressa and their replies to questions from judges.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

10. The applicants were born in 1983, 1987 and 1988 respectively. Mr Khlaifia (“the first applicant”) lives in Om Laarass (Tunisia); Mr Tabal and Mr Sfar (“the second and third applicants”) live in El Mahdia (Tunisia).

#### **A. The applicants’ arrival on the Italian coast and their removal to Tunisia**

11. On 16 September 2011 in the case of the first applicant, then the next day, 17 September, in the case of the second and third applicants, the applicants left Tunisia with others on board rudimentary vessels heading for the Italian coast. After several hours at sea, their vessels were intercepted by the Italian coastguard, which escorted them to a port on the island of Lampedusa. The applicants arrived on the island on 17 and 18 September 2011 respectively.

12. The applicants were transferred to an Early Reception and Aid Centre (*Centro di Soccorso e Prima Accoglienza* – “CSPA”) on the island of Lampedusa at Contrada Imbriacola where, after giving them first aid, the authorities proceeded with their identification. According to the Government, on this occasion individual “information sheets” were filled in

for each of the migrants concerned (see paragraph 224 below); this is disputed by the applicants (see paragraph 222 below).

13. They were accommodated in a part of the centre reserved for adult Tunisians. According to the applicants, they were held in an overcrowded and dirty area and were obliged to sleep on the floor because of the shortage of available beds and the poor quality of the mattresses. They had to eat their meals outside, sitting on the ground. The centre was kept permanently under police surveillance, making any contact with the outside world impossible.

14. The applicants remained in the CSPA until 20 September, when a violent revolt broke out among the migrants. The premises were gutted by fire and the applicants were taken to a sports complex on Lampedusa for the night. At dawn on 21 September they managed, together with other migrants, to evade the police surveillance and walk to the village of Lampedusa. From there, with about 1,800 other migrants, they started a demonstration through the streets of the island. After being stopped by the police, the applicants were taken first back to the reception centre and then to Lampedusa airport.

15. On the morning of 22 September 2011 the applicants were flown to Palermo. After disembarking they were transferred to ships that were moored in the harbour there. The first applicant was placed on the *Vincent*, with some 190 other people, while the second and third applicants were put on board the *Audace*, with about 150 others.

16. The applicants described the conditions as follows. All the migrants on each vessel were confined to the restaurant areas, access to the cabins being prohibited. They slept on the floor and had to wait several hours to use the toilets. They could go outside onto the decks twice a day for only a few minutes at a time. They were allegedly insulted and ill-treated by the police, who kept them under permanent surveillance, and they claimed not to have received any information from the authorities.

17. The applicants remained on the ships for a few days. On 27 September 2011 the second and third applicants were taken to Palermo airport pending their removal to Tunisia; the first applicant followed suit on 29 September.

18. Before boarding the planes, the migrants were received by the Tunisian Consul. In their submission, the Consul merely recorded their identities in accordance with the agreement between Italy and Tunisia of April 2011 (see paragraphs 36-40 below).

19. In their application the applicants asserted that at no time during their stay in Italy had they been issued with any document.

Annexed to their observations, the Government, however, produced three refusal-of-entry orders dated 27 and 29 September 2011 that had been issued in respect of the applicants. Those orders, which were virtually

identical and drafted in Italian with a translation into Arabic, read as follows:

“The Chief of Police (*questore*) for the Province of Agrigento

Having regard to the documents in the file, showing that

(1) on ‘17 [18] September 2011’ members of the police force found in the province of ‘Agrigento’, near the border of: ‘island of Lampedusa’, Mr [surname and forename] born ... on [date] ... ‘Tunisian’ national ... not fully identified, ‘undocumented’ (*sedicente*);

(2) the alien entered the territory of the country by evading the border controls;

(3) the identification (*rintraccio*) of the alien took place on/immediately after his arrival on national territory, and precisely at: ‘island of Lampedusa’;

WHEREAS none of the situations [provided for in] Article 10 § 4 of Legislative Decree no. 286 of 1998 is present;

CONSIDERING that it is appropriate to proceed in accordance with Article 10 § 2 of Legislative Decree no. 286 of 1998;

#### ORDERS

that the above-mentioned person be

#### REFUSED LEAVE TO ENTER AND RETURNED

– An appeal may be lodged against the present order within a period of sixty days from the date of its service, with the Justice of the Peace of Agrigento.

– The lodging of an appeal will not, in any event, suspend the enforcement (*efficacia*) of the present order.

– The director of the Migration Office will proceed, for the enforcement of the present order, with its notification, together with a summary translation into a language spoken by the alien or into English, French or Spanish; and with its transmission to the diplomatic or consular delegation of the State of origin, as provided for by Article 2 § 7 of Legislative Decree no. 286 of 1998; and with its registration under Article 10 § 6 of the said Legislative Decree.

To be escorted to the border at: ‘Rome Fiumicino’

[Issued at] Agrigento [on] 27[29]/09/2011 on behalf of the Chief of Police

[Signature]”

20. These orders were each accompanied by a record of notification bearing the same date, also drafted in Italian with an Arabic translation. In the space reserved for the applicants’ signatures, both records contain the handwritten indication “[the person] refused to sign or to receive a copy” (*si rifiuta di firmare e ricevere copia*).

21. On their arrival at Tunis airport, the applicants were released.

## **B. Decision of the Palermo preliminary investigations judge**

22. A number of anti-racism associations filed a complaint about the treatment to which the migrants had been subjected, after 20 September 2011, on board the ships *Audace*, *Vincent* and *Fantasy*.

23. Criminal proceedings for abuse of power and unlawful arrest (Articles 323 and 606 of the Criminal Code) were opened against a person or persons unknown. On 3 April 2012 the public prosecutor sought to have the charges dropped.

24. In a decision of 1 June 2012 the Palermo preliminary investigations judge (*giudice per le indagini preliminari*) granted the public prosecutor's request.

25. In his reasoning the judge emphasised that the purpose of placing the migrants in the CSPA was to accommodate them, to assist them and to cater for their hygiene-related needs for as long as was strictly necessary, before sending them to an Identification and Removal Centre (*Centro di Identificazione ed Espulsione* – "CIE") or taking any measures in their favour. At the CSPA the migrants could, according to him, obtain legal assistance and information about asylum application procedures.

The judge shared the public prosecutor's view that the interpretation of the conditions concerning the grounds for and duration of the confinement of migrants in a CSPA was sometimes vague. He also agreed with the public prosecutor that a range of factors were to be taken into consideration, leading to the conclusion that the facts of the case could not be characterised as a criminal offence.

The judge noted that the Agrigento police authority (*questura*) had merely registered the presence of the migrants at the CSPA without taking any decisions ordering their confinement.

26. According to the judge, the unstable balance on the island of Lampedusa had been upset on 20 September 2011, when a group of Tunisians had carried out an arson attack, seriously damaging the CSPA at Contrada Imbriacola and rendering it incapable of fulfilling its purpose of accommodating and assisting migrants. The authorities had then organised transfer by air and sea to evacuate migrants from Lampedusa. The following day, clashes had taken place in the island's port between the local population and a group of foreigners who had threatened to explode gas canisters. The judge explained that there had thus been a situation which was likely to degenerate, and which was covered by the notion of "state of necessity" (*stato di necessità*) as provided for in Article 54 of the Criminal Code (see paragraph 34 below). It was thus an imperative to arrange for the immediate transfer of some of the migrants by using, among other means, the ships.

As to the fact that, in the emergency situation, no formal decision had been taken to place the migrants on board the ships, the judge found that



this could not be regarded as an unlawful arrest and that the conditions for the migrants' transfer to CIEs were not satisfied. Firstly, the CIEs were overcrowded, and secondly, the agreements with the Tunisian authorities suggested that their return was supposed to be prompt. The fact that a refusal-of-entry measure (*respingimento*) had been ordered in respect of the migrants, without judicial scrutiny, a few days after their arrival, was not unlawful in the judge's view. The calculation of a "reasonable time" for the adoption of that measure and for the migrants' stay in the CSPA had to take account of logistical difficulties (state of the sea, distance between Lampedusa and Sicily) and of the number of migrants concerned. In those circumstances, the judge concluded that there had been no infringement of the law.

Moreover, the judge was of the view that no malicious intent could be attributed to the authorities, whose conduct had been prompted first and foremost by the public interest. The migrants had not sustained any unfair harm (*danno ingiusto*).

27. In so far as the complainants had alleged that the way in which the migrants had been treated had been detrimental to their health, the judge noted that the investigations had found that nobody on the ships had applied for asylum. Those who, at the Lampedusa CSPA, had expressed an intention to do so, together with any vulnerable individuals, had been transferred to the centres of Trapani, Caltanissetta and Foggia. Unaccompanied minors had been placed in temporary accommodation and no pregnant women had been transferred to the ships. The migrants on board had been able to receive medical assistance, hot water, electricity, meals and hot drinks. Moreover, as recorded in a press agency note of 25 September 2011, T.R., a member of parliament (MP) had boarded the ships in the port of Palermo, and had observed that the migrants were in good health, that they were receiving assistance and were sleeping in cabins containing bed linen or reclining seats (*poltrone reclinabili*). Some of the Tunisians had been taken to hospital, while others had been treated on board by medical staff. Accompanied by the deputy chief of police (*vice questore*) and by police officers, the MP in question had talked with some of the migrants. He had thus been able to observe that they had access to prayer rooms, that the food was satisfactory (pasta, chicken, vegetables, fruit and water) and that the Civil Protection Authority (*Protezione civile*) had provided them with clothing. Some of the migrants had complained of a lack of razors, but the MP had observed that this could be explained by a measure taken to prevent self-harm.

28. The judge noted that, even though the migrants had not been in custody or under arrest, a photograph published in a newspaper had shown one of them with his hands bound by black ribbons and in the company of a police officer. He had been part of a small group of individuals who, fearing immediate removal, had engaged in acts of self-harm and had caused

damage to buses. In the judge's view, the restraint in question had been necessary to guarantee the physical well-being of the persons concerned and to avoid aggressive acts against police officers who were neither armed nor equipped with any means of coercion. In any event, the conduct of the police officers had been justified by a "state of necessity", within the meaning of Article 54 of the Criminal Code (see paragraph 34 below).

29. In the light of the foregoing, the preliminary investigations judge concluded that the case file contained no evidence of the physical and mental elements of the offences provided for in Articles 323 and 606 of the Criminal Code.

### **C. Decisions of the Agrigento Justice of the Peace**

30. Two other migrants in respect of whom a refusal-of-entry order had been issued challenged those orders before the Agrigento Justice of the Peace.

31. In two decisions (*decreti*) of 4 July and 30 October 2011, respectively, the Justice of the Peace annulled those orders.

In his reasoning the judge observed that the complainants had been found on Italian territory on 6 May and 18 September 2011 respectively and that the orders at issue had been adopted only on 16 May and 24 September 2011. While acknowledging that Article 10 of Legislative Decree no. 286 of 1998 (see paragraph 33 below) did not indicate any time-frame for the adoption of such orders, the judge took the view that a measure which by its very nature restricted the freedom of the person concerned had to be taken within a reasonably short time after the identification (*fermo*) of the unlawful migrant. To find otherwise amounted to allowing *de facto* detention of the migrant in the absence of any reasoned decision of the authority, which would contravene the Constitution.

## **II. RELEVANT DOMESTIC LAW AND MATERIAL**

### **A. The Constitution**

32. Article 13 of the Italian Constitution reads as follows:

"Personal liberty is inviolable.

No one may be detained, inspected, or searched, or otherwise subjected to any restriction of personal liberty, except by a reasoned order of a judicial authority and only in such cases and in such manner as provided by law.

In exceptional circumstances and under such conditions of necessity and urgency as shall be precisely defined by law, the police may take provisional measures that shall be referred within 48 hours to a judicial authority and which, if not validated by the latter in the following 48 hours, shall be deemed withdrawn and ineffective.

Any act of physical or mental violence against persons subjected to a restriction of personal liberty shall be punished.

The law shall establish the maximum duration of any preventive measure of detention (*carcerazione preventiva*).”

## **B. Legislation on the removal of irregular migrants**

33. Legislative Decree (*decreto legislativo*) no. 286 of 1998 (“Consolidated text of provisions concerning immigration regulations and rules on the status of aliens”), as amended by Laws no. 271 of 2004 and no. 155 of 2005, and by Legislative Decree no. 150 of 2011, provides *inter alia* as follows:

### **Article 10 (refusal of entry)**

“1. The border police shall refuse entry (*respinge*) to aliens who seek to cross the border without meeting the conditions laid down in the present consolidated text governing entry into the territory of the State.

2. Refusal of entry combined with removal shall, moreover, be ordered by the Chief of Police (*questore*) in respect of aliens:

(a) who have entered the territory of the State by evading border controls, when they are arrested on entry or immediately afterwards;

(b) or who ... have been temporarily allowed to remain for purposes of public assistance.

...

4. The provisions of paragraphs 1 [and] 2 ... do not apply to the situations provided for in the applicable provisions governing political asylum, the grant of refugee status or the adoption of temporary protection measures on humanitarian grounds.

...”

### **Article 13 (administrative deportation)**

“1. For reasons of public order or national security the Minister of the Interior may order the deportation of an alien, even if he or she [does not reside] in the territory of the State, giving prior notice thereof to the Prime Minister and the Minister for Foreign Affairs.

2. The prefect shall give directions for removal where the alien:

(a) has entered the territory of the State by evading border controls and has not already been refused entry under Article 10 hereof;

...

8. An appeal may be lodged against a deportation order with the judicial authority ...”

### **Article 14 (execution of removal measures)**

“1. Where, in view of the need to provide assistance to an alien, to conduct additional checks of his or her identity or nationality, or to obtain travel documents, or

on account of the lack of availability of a carrier, it is not possible to ensure the prompt execution of the deportation measure by escorting the person to the border or of the refusal-of-entry measure, the Chief of Police (*questore*) shall order that the alien be held for as long as is strictly necessary at the nearest Identification and Removal Centre, among those designated or created by order of the Minister of the Interior in collaboration (*di concerto*) with the Minister for Social Solidarity and the Treasury, the Minister for the Budget, and the Minister for Economic Planning.

...”

### C. Criminal Code

34. Article 54 § 1 of the Criminal Code reads, in its relevant part, as follows:

“Acts committed under the constraint of having to save [the perpetrator or a third party] from an instant danger of serious bodily harm shall not be liable to punishment, provided that such danger has not been voluntarily caused [by the perpetrator] and cannot otherwise be avoided, and provided that the said act is proportionate to the danger. ...”

### D. Italian Senate

35. On 6 March 2012 the Italian Senate’s Special Commission for Human Rights (the “Senate’s Special Commission”) approved a report “on the state of [respect for] human rights in prisons and reception and detention centres in Italy”. Visited by the Commission on 11 February 2009, the Lampedusa CSPA is described particularly in the following passages:

“Stays at the Lampedusa centre were supposed to be limited to the time strictly necessary to establish the migrant’s identity and the lawfulness of his presence in Italy or to decide on his removal. In reality, as has already been criticised by the UNHCR and a number of organisations operating on the spot, the duration of such stays has sometimes extended to over twenty days without there being any formal decision as to the legal status of the person being held. Such prolonged confinement, combined with an inability to communicate with the outside world, and the lack of freedom of movement, without any legal or administrative measure providing for such restrictions, has led to heightened tension, often manifested in acts of self-harm. Numerous appeals by organisations working on the island have been made concerning the lawfulness of the situation there.

...

The rooms measure about 5 x 6 metres: they are supposed to accommodate twelve persons. They contain four-tier bunk beds, placed side by side, occupied by up to twenty-five men per room ... In many of the blocks, foam-rubber mattresses are placed along the corridor. In many cases the foam-rubber from the mattresses has been torn away to be used as a cushion. In some cases, double mattresses, protected by improvised covers, have been placed on the landings, outside ... On the ceiling, in many rooms, the plastic shade around the light has been removed and the bulb has disappeared. At the end of the corridor, on one side, there are toilets and showers. There is no door and privacy is ensured by cloth or plastic curtains placed in an

improvised and haphazard manner. There are no taps and water flows from the pipes only when centrally activated. The pipes sometimes get blocked; on the floor, water or other liquids run as far as the corridor and into the rooms where the foam-rubber mattresses have been placed. The smell from the toilets pervades the whole area. When it starts to rain, those on the metal staircases, who have to go up to the floor above, get wet and carry dampness and dirt into the living quarters.”

### III. BILATERAL AGREEMENTS WITH TUNISIA

36. On 5 April 2011 the Italian Government entered into an agreement with Tunisia on measures to control the flow of irregular migrants from that country.

37. The text of the agreement had not been made public. However, appended in an annex to their request for referral to the Grand Chamber, the Government produced extracts from the minutes of a meeting held in Tunis on 4 and 5 April 2011 between the Ministries of the Interior of Tunisia and Italy. According to a press release dated 6 April 2011 on the website of the Italian Ministry of the Interior<sup>1</sup>, Tunisia undertook to strengthen its border controls with the aim of avoiding fresh departures of irregular migrants, using logistical resources made available to it by the Italian authorities.

38. In addition, Tunisia undertook to accept the immediate return of Tunisians who had unlawfully reached the Italian shore after the date of the agreement. Tunisian nationals could be returned by means of simplified procedures, involving the mere identification of the person concerned by the Tunisian consular authorities.

39. According to the indications given by the Government in their written observations of 25 April 2016 before the Grand Chamber, there had been an initial agreement with Tunisia in 1998; it had been announced on the Interior Ministry’s website, added to the treaty archive of the Ministry of Foreign Affairs and International Cooperation and published in Official Gazette no. 11 of 15 January 2000.

40. The Government produced a *note verbale* concerning the bilateral agreement that Italy concluded with Tunisia in 1998, appending it in an annex to their request for referral to the Grand Chamber. The document in question, emanating from the Italian Government and dated 6 August 1998, and which does not seem to be the text applied in the applicants’ case (see paragraph 103 below), contains provisions on bilateral cooperation for the prevention and repression of illegal immigration, the readmission of the two countries’ nationals, the return of nationals of third countries outside the Arab Maghreb Union to their countries of last departure, and the taking-back of migrants after readmission in error.

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1. The press release can be consulted at:

[http://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala\\_stamp/notizie/im\\_migrazione/000073\\_2011\\_04\\_06\\_accordo\\_Italia-Tunisia.html](http://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stamp/notizie/im_migrazione/000073_2011_04_06_accordo_Italia-Tunisia.html).

The text of the *note verbale* shows that the Italian Government agreed to support Tunisia's efforts to combat illegal immigration by providing technical and operational material assistance and by making a financial contribution. Each Party undertook, at the request of the other Party and without further formality, to readmit into its territory any person who did not meet the conditions of entry or residence applicable in the requesting State, in so far as it had been established that the person concerned was a national of the requested State. The text refers to the documents required for the identification of those concerned and provides (part II, point 5) that if the consular authority of the requested State considers it necessary to hear the person concerned, a representative of the authority of that State may go to the court office, or to the reception centre or medical facility where the migrant is legally residing, in order to interview him or her.

The *note verbale* also describes the procedure for issuing a *laissez-passer* and for the removal of migrants, while indicating the Italian Government's undertaking "not to resort to mass or special removals" of the persons concerned.

#### IV. THE RETURN DIRECTIVE

41. In the European Union (EU) context, the return of irregular migrants is governed by Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 (the "Return Directive") "on common standards and procedures in Member States for returning illegally staying third-country nationals". The Directive contains the following provisions in particular:

##### **Article 1** **Subject matter**

"This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations."

##### **Article 2** **Scope**

"1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:

(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

...”

### **Article 8 Removal**

“1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

6. Member States shall provide for an effective forced-return monitoring system.”

### **Article 12 Form**

“1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

3. Member States may decide not to apply paragraph 2 to third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.

Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned.”

### **Article 13 Remedies**

“1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.

4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.”

### **Article 15 Detention**

“1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.



The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

- (a) a lack of cooperation by the third-country national concerned, or
- (b) delays in obtaining the necessary documentation from third countries.”

#### **Article 16** **Conditions of detention**

“1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.”

#### **Article 18** **Emergency situations**

“1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member

State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.”

42. When interpreting the Return Directive, the Court of Justice of the European Union (CJEU) held that an alien was entitled, before a decision to return him or her was adopted, to express his or her view on the legality of his or her stay (see, in particular, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, case C-249/13, judgment of 11 December 2014, §§ 28-35).

43. It can be seen from the CJEU’s case-law that, in spite of the lack of express provision for the right to be heard in the Return Directive, that right applies as a fundamental principle of EU law (see, in particular, Articles 41, 47 and 48 of the EU’s Charter of Fundamental Rights; also the judgments *M.G. and N.R v. Staatssecretaris van Veiligheid en Justitie*, C-383/13 PPU, 10 September 2013, § 32, and *Sophie Mukarubega v. Préfet de police et Préfet de la Seine-Saint-Denis*, C-166/13, judgment of 5 November 2014, §§ 42-45).

The CJEU clarified that the right to be heard: (a) guaranteed to every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely (*Khaled Boudjlida*, cited above, § 36, and *Sophie Mukarubega*, cited above, § 46); and (b) enabled the competent authority effectively to take into account all relevant information, to pay due attention to the observations submitted by the person concerned, and thus to give a detailed statement of reasons for its decision (*Khaled Boudjlida*, cited above, §§ 37-38).

In the *Khaled Boudjlida* judgment (cited above, §§ 55, 64-65 and 67), the CJEU added: (a) that the alien need not necessarily be heard in respect of all the information on which the authority intends to rely to justify its return decision, but must simply have an opportunity to present any arguments against his removal; (b) that the right to be heard in a return procedure does not entitle the person to free legal assistance; and (c) that the duration of the interview is not decisive in ascertaining whether the person concerned has actually been heard (in the case at issue it had lasted about thirty minutes).

44. In the CJEU’s view, a decision taken following an administrative procedure in which the right to be heard has been infringed will result in annulment only if, had it not been for such an irregularity, the outcome of

the procedure might have been different (see *M.G. and N.R.*, cited above, §§ 38 and 44, concerning decisions to extend detention pending removal; in §§ 41-43 of that judgment it is stated that the Directive's effectiveness would otherwise be undermined and the objective of removal called into question).

45. Lastly, the CJEU has held that the right to be heard can be subjected to restrictions, provided they correspond to objectives of general interest and do not involve, with regard to the objective pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right guaranteed (see *M.G. and N.R.*, cited above, § 33, and *Sophie Mukarubega*, cited above, §§ 53 and 82, where it is stated that the person concerned does not have to be heard by the national authorities twice, both on his or her application to stay and on a return decision, but only on one of those questions).

## V. OTHER RELEVANT INTERNATIONAL LAW MATERIAL

### A. International Law Commission

46. The International Law Commission (ILC), at its sixty-sixth session, in 2014, adopted a set of "Draft articles on the expulsion of aliens". This text was submitted to the United Nations General Assembly, which took note of it (Resolution A/RES/69/119 10 December 2014). The following Articles are of particular interest:

#### **Article 2** **Use of terms**

"For the purposes of the present draft articles:

- (a) 'expulsion' means a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State;
- (b) 'alien' means an individual who does not have the nationality of the State in whose territory that individual is present."

#### **Article 3** **Right of expulsion**

"A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights."

#### **Article 4** **Requirement for conformity with law**

"An alien may be expelled only in pursuance of a decision reached in accordance with law."

**Article 5**  
**Grounds for expulsion**

- “1. Any expulsion decision shall state the ground on which it is based.
2. A State may only expel an alien on a ground that is provided for by law.
3. The ground for expulsion shall be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.
4. A State shall not expel an alien on a ground that is contrary to its obligations under international law.”

**Article 9**  
**Prohibition of collective expulsion**

- “1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group.
2. The collective expulsion of aliens is prohibited.
3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.
4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.”

**Article 13**  
**Obligation to respect the human dignity and human rights of aliens  
subject to expulsion**

- “1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.
2. They are entitled to respect for their human rights, including those set out in the present draft articles.”

**Article 15**  
**Vulnerable persons**

- “1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.
2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.”

**Article 17**  
**Prohibition of torture or cruel, inhuman or degrading treatment  
or punishment**

- “The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.”

**Article 19**  
**Detention of an alien for the purpose of expulsion**

“1. (a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.

(b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or, subject to judicial review, by another competent authority.

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2, detention for the purpose of expulsion shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.”

47. In its Commentary to Draft Article 9 the ILC observed in particular as follows:

“(1) Paragraph 1 of draft article 9 contains a definition of collective expulsion for the purposes of the present draft articles. According to this definition, collective expulsion is understood to mean the expulsion of aliens ‘as a group’. This criterion is informed by the case-law of the European Court of Human Rights. It is a criterion that the Special Rapporteur on the rights of non-citizens of the Commission on Human Rights, Mr. David Weissbrodt, had also endorsed in his final report of 2003. Only the ‘collective’ aspect is addressed in this definition, which must be understood in the light of the general definition of expulsion contained in draft article 2, subparagraph (a).

...

(4) The prohibition of the collective expulsion of aliens set out in paragraph 2 of the present draft article should be read in the light of paragraph 3, which elucidates it by specifying the conditions under which the members of a group of aliens may be expelled concomitantly without such a measure being regarded as a collective expulsion within the meaning of the draft articles. Paragraph 3 states that such an expulsion is permissible provided that it takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles. The latter phrase refers in particular to draft article 5, paragraph 3, which states that the ground for expulsion must be assessed in good faith and reasonably, in the light of all the circumstances, taking into account in particular, where relevant, the gravity of the facts, the conduct of the alien in question or the current nature of the threat to which the facts give rise.

...”

## **B. Council of Europe's Parliamentary Assembly**

48. The facts of the case are connected with the large-scale arrival of unlawful migrants on the Italian coast in 2011 following, in particular, the uprisings in Tunisia and the conflict in Libya.

49. In that context the Council of Europe's Parliamentary Assembly (PACE) set up an "Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores" (the "PACE Ad Hoc Sub-Committee"), which carried out a fact-finding visit to Lampedusa on 23 and 24 May 2011. A report on the visit was published on 30 September 2011. Its relevant passages read as follows:

### **"II. History of Lampedusa as a destination for mixed migration flows**

...

9. Because of its geographical location close to the African coast, Lampedusa has experienced several episodes in which it has had to cope with a large influx by sea of people wanting to go to Europe (31 252 in 2008; 11 749 in 2007; 18 047 in 2006; 15 527 in 2005).

10. The numbers arriving fell sharply in 2009 and 2010 (2 947 and 459, respectively) following an agreement between Italy and Muammar Gaddafi's Libya. This agreement drew strong criticism because of the human rights violations in Libya and the appalling living conditions of migrants, refugees and asylum-seekers in the country. It also drew criticism, subsequently validated by UNHCR, that it risked denying asylum seekers and refugees access to international protection. It did however prove extremely effective in halting the influx and as a result, the island's reception centres were then closed and the international organisations active in Lampedusa withdrew their field presence.

11. In 2011, following the uprisings in Tunisia and then in Libya, the island was confronted with a fresh wave of arrivals by boat. Arrivals resumed in two stages. The first to arrive on the island were Tunisians, followed by boats from Libya, among which many women and young children. The influx began on 29 January 2011 and the population of the island was quickly multiplied by two.

12. Following these arrivals, Italy declared a humanitarian emergency in Lampedusa and called for solidarity from the European Union member states. The Prefect of Palermo was given emergency powers to manage the situation.

13. As of 21 September 2011, 55 298 people had arrived by sea in Lampedusa (27 315 from Tunisia and 27 983 from Libya, mainly nationals of Niger, Ghana, Mali and the Côte d'Ivoire).

...

### **V. The players on the ground and their responsibilities**

26. The Prefecture of the province of Agrigento is responsible for all questions relating to the reception of persons arriving on the island until they are transferred elsewhere. The prefecture also oversees the *Accoglienza* private co-operative which manages the island's two reception centres. The immigration police office of the province of Agrigento is responsible for identifying new arrivals, transferring them

and repatriating them if necessary. Since 13 April 2011, the Italian civil protection department has been co-ordinating the management of migration flows from North Africa.

27. The international community is also active on the ground. The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the Red Cross, the Order of Malta and the NGO Save the Children have teams on the spot.

28. UNHCR, the IOM, the Red Cross and Save the Children are part of the 'Praesidium Project' and are helping to manage the arrivals of mixed migration flows by sea on Lampedusa. These organisations are authorised to maintain a permanent presence inside the Lampedusa reception centres and have interpreters and cultural mediators available. They dispatched teams to Lampedusa straight away in February 2011 (as noted earlier, their operation had been suspended when the arrivals decreased). The Praesidium Project, which has since been extended to other centres in Italy, stands as an example of good practice in Europe and the organisations involved have jointly published a handbook on management of mixed migration flows arriving by sea (for the time being in Italian only, but soon to be translated into English).

29. The members of the Ad Hoc Sub-Committee found that all these players are working on good terms and are endeavouring to co-ordinate their efforts, with the shared priority of saving lives in sea rescue operations, doing everything possible to receive new arrivals in decent conditions and then assisting in rapidly transferring them to centres elsewhere in Italy.

#### **VI. Lampedusa's reception facilities**

30. It is essential for transfers to centres elsewhere in Italy to be effected as quickly as possible because the island's reception facilities are both insufficient to house the number of people arriving and unsuitable for stays of several days.

31. Lampedusa has two reception centres: the main centre at Contrada Imbriacola and the Loran base.

32. The main centre is an initial reception and accommodation centre (CSPA). The Ad Hoc Sub-Committee was informed by the director of the centre that its capacity varies from 400 to 1 000 places. At the time of the visit, 804 people were housed there. Reception conditions were decent although very basic. The rooms were full of mattresses placed side by side directly on the ground. The buildings, which are prefabricated units, are well ventilated because the rooms have windows and the sanitary facilities seem sufficient when the centre is operating at its normal capacity.

33. At the time of the Ad Hoc Sub-Committee's visit, the centre was divided in two. One part was reserved for persons arriving from Libya and unaccompanied minors (including unaccompanied Tunisian minors). The other part, a closed centre within the centre (itself closed), was reserved for Tunisian adults.

...

#### **VIII. Health checks**

41. The many health teams of the various organisations present (Red Cross, MSF, Order of Malta) and the numerous regional teams are co-ordinate[d] by the Head of the Palermo Health Unit.

42. As soon as coastguards become aware of a boat arriving, they advise the medical co-ordinator and inform him of the number of people on board. All the

persons concerned are then immediately informed and put on alert whatever the time of day or night.

43. Initial checks on the state of health of persons arriving are carried out in the port, as soon as they have disembarked. Prior to that, Order of Malta members/doctors accompany the coastguard or customs services on interception and rescue operations at sea. They inform the medical teams on hand at the port of any cases possibly requiring specific and immediate medical treatment.

44. On reaching the port, the new arrivals are quickly classified according to their needs using a clear colour-coding system. People requiring hospital treatment are transferred by helicopter to Palermo or elsewhere. The hospitals are obliged to accept these patients, even if their capacity is exceeded.

45. Sometimes there is not enough time to carry out initial checks on all those arriving at the port, and checks therefore have to be continued at the reception centres. Emphasis has been placed on the need also to achieve maximum standardisation of the procedures used at the centres.

46. The most common problems are: sea sickness, disorders of the upper respiratory tract, burns (fuel, sea water, sun or a combination of the three), dehydration, generalised pain (due to posture in the boat), psychological disorders or acute stress (because of the high risk of losing one's life during the crossing). Some people arriving from Libya were suffering from acute stress even before starting the crossing. New arrivals are extremely vulnerable people who may have suffered physical and/or psychological violence and their trauma is sometimes due to the way they have been treated in Libya. There are also many pregnant women who require closer examination. Some cases of tuberculosis have been detected. The persons concerned are immediately placed in quarantine in a hospital.

47. Only a general evaluation is made of the state of health of new arrivals in Lampedusa. An individual assessment is not possible on the island and is carried out elsewhere after transfer. Anyone wishing to be examined can be, and no request to this effect is refused. A regular inspection of the sanitary facilities and food at the centres is carried out by the Head of the Palermo Health Unit.

48. MSF and the Red Cross voiced concerns regarding health conditions in the centres when they are overcrowded. It was also pointed out that the Tunisians were separated from the other new arrivals by a closed barrier and did not have direct access to the reception centre's medical teams.

#### **IX. Information about asylum procedures**

49. The UNHCR team provides new arrivals with basic information about existing asylum procedures, but it was stressed that Lampedusa was not the place to provide potential refugees and asylum seekers with exhaustive information on this subject. Relevant information and help with asylum application procedures are provided once the new arrivals have been transferred to other, less provisional reception centres elsewhere in Italy. If people express the wish to seek asylum, UNHCR passes on the information to the Italian police.

50. However, when large numbers of people arrive at the same time (which is increasingly the case) and transfers are carried out very quickly, the new arrivals are sometimes not informed about their right to request asylum. They receive this information at the centre to which they are transferred. This shortcoming in the provision of information about access to international protection may present a problem insofar as people of some nationalities are liable to be sent straight back to



their countries of origin. As a rule, however, new arrivals are not in a position to be provided immediately with detailed information about access to the asylum procedure. They have other priorities: they are exhausted and disoriented and want to wash, eat and sleep.

#### **X. Tunisians**

51. In the recent spate of arrivals, they were the first to arrive in Lampedusa in February 2011. These arrivals were problematical for several reasons. As stated above, this was because arrivals by sea had decreased significantly in 2009 and 2010, and the island's reception centres had been closed. Tunisian migrants therefore found themselves on the streets, in appalling conditions. When the centres re-opened, they were immediately saturated. The Tunisians were subsequently transferred to holding centres elsewhere in Italy, then, once these were saturated, to open reception centres designed for asylum-seekers.

52. The fact that the vast majority of Tunisians are economic migrants and the difficulty of organising immediate returns to Tunisia, prompted the Italian authorities to issue a decree on 5 April 2011 granting them temporary residence permits valid for 6 months. Although 25 000 Tunisians had already arrived in Italy on that date, only 12 000 took advantage of this measure (the other 13 000 having already disappeared from the centres). The consequences of this measure are well-known: tensions with France and a serious re-assessment of freedom of movement in the Schengen area.

53. On 5 April 2011, Italy signed an agreement with Tunisia providing for a certain number of daily returns of Tunisian migrants arriving in Italy after that date. The text of the agreement has never been made public, but quotas of between 30 and 60 returns per day have been mentioned. At the time of the Ad Hoc Sub-Committee's visit, returns to Tunisia were suspended.

54. As a result of this suspension of returns, some 190 Tunisians were being held on the island at the time of the Ad Hoc Sub-Committee's visit. Some of them had been there for more than 20 days, in a closed centre inside the closed Contrada Imbriacola centre. Despite the authorities' claim that the Tunisians were not detainees because they were not in cells, the members of the Sub-Committee found that the conditions to which they were subjected were similar to detention and deprivation of freedom.

55. While the members of the Ad Hoc Sub-Committee appreciate the Italian authorities' concern to contain this wave of irregular immigration from Tunisia, some rules have to be observed where detention is concerned. The Contrada Imbriacola centre is not a suitable holding facility for irregular migrants. In practice, they are imprisoned there without access to a judge. As already pointed out by the Parliamentary Assembly in its Resolution 1707 (2010), '*detention shall be carried out by a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review*'. These criteria are not met in Lampedusa and the Italian authorities should transfer irregular migrants immediately to appropriate holding facilities, with the necessary legal safeguards, elsewhere in Italy.

56. Another key point made in this resolution is access to information. All detainees must be informed promptly, in a language that they can understand, '*of the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention*'. While it is true that the Tunisians interviewed by the Ad Hoc Sub-Committee were perfectly aware that they had entered Italian territory illegally (in fact, it was not the first attempt for some of them and a number had already been sent back to Tunisia on previous occasions), the same is not true of information about their rights and procedures. The Italian authorities themselves were unable to tell the

Ad Hoc Sub-Committee when returns to Tunisia would resume. As well as being a significant stress factor, this uncertainty highlights the inappropriateness of holding Tunisians on Lampedusa for long periods without access to a judge.

57. As mentioned earlier, on 20 September a fire severely damaged the main reception centre. It is reported that Tunisian migrants carried out the arson in protest to their detention conditions and their forthcoming forced return to Tunisia. It should be noted that on 20 September, more than 1 000 Tunisians were kept in detention on the island, 5 times more than at the time of the visit of the ad-hoc Sub-Committee.

58. With less than 200 Tunisians on the island, the ad hoc Sub-Committee was already not allowed to visit the closed part of the reception centre in which the Tunisians were kept. The authorities informed the members of the ad hoc Sub-Committee that for security reasons such a visit was not possible. They reported tensions inside this part of the Centre, as well as attempt of self harm by some of the Tunisians.

59. Considering that the authorities were already worried by a tense situation with less than 200 Tunisians in the Centre, the question occurs as to why more than 1 000 were kept in this very Centre on 20 September. As a matter of fact, this centre is neither designed nor legally designated as a detention centre for irregular migrants.

...

#### **XIV. A disproportionate burden for the island of Lampedusa**

77. The inadequate and belated management of the crisis early 2011 as well as the recent events will unquestionably have irreparable consequences for the inhabitants of Lampedusa. The 2011 tourist season will be a disaster. Whereas 2010 had seen a 25% increase in the number of visitors, from February 2011 onwards all advance bookings were cancelled. At the end of May 2011, none of the island's hotels had a single booking. Tourism industry professionals conveyed their feeling of helplessness to the Ad Hoc Sub-Committee. They had incurred expenditure on renovating or improving tourist facilities using the money paid for advance bookings. They had had to repay these sums when the bookings were cancelled and now find themselves in a precarious position, in debt and with no prospect of little money coming in for the 2011 season.

78. The members of the Ad Hoc Sub-Committee also saw the work involved in cleaning and in removal of the boats (or what remains of them, which is clogging up the harbour) and the potential danger that these boats or wrecks pose to water quality around the island, which has to meet strict environmental standards. These operations are also very costly (half a million euros for the 42 boats still afloat at the time of the visit, not to mention the 270 wrecks littering the island). Steps have been taken by the civil protection department to ensure that the boats are dismantled and any liquid pollutants are pumped out.

79. The dilapidated state of these boats reflects the degree of despair felt by people who are prepared to risk their lives crossing the Mediterranean on such vessels. The coastguards told the Ad Hoc Sub-Committee that only 10% of the boats arriving were in a good state of repair.

80. During the delegation's visit, representatives of the island's inhabitants (in particular people representing the hotel and restaurant trade) and the Mayor of Lampedusa put forward their ideas for remedying this disaster for the local economy. At no time did they say that they no longer intended to take in people arriving by boat

- on the contrary. They did however ask for fair compensation for the losses entailed by their island's role as a sanctuary.

81. They therefore drew up a document containing several proposals, which they forwarded to the delegation. The key proposal is for the island to be recognised as a free zone. The delegation took due note of this proposal and of that concerning a one-year extension of the deadline for the inhabitants' tax payments. While recognising that these matters fall outside its mandate, the Ad Hoc Sub-Committee calls on the relevant Italian authorities to consider these requests in view of the heavy burden borne by the island and its inhabitants in the face of the influx of irregular migrants, refugees and asylum-seekers arriving by sea.

#### **XV. Conclusions and recommendations**

...

92. On the basis of its observations, the Ad Hoc Sub-Committee calls on the Italian authorities:

i. to continue to comply immediately and without exception with their obligation to rescue persons in distress at sea and to guarantee international protection, including the right of asylum and nonrefoulement;

ii. to introduce flexible measures for increasing reception capacities on Lampedusa;

iii. to improve conditions at the existing centres, and in particular the Loran base, while ensuring as a matter of priority that health and safety conditions meet existing standards – even when the centres are overcrowded – and carrying out strict and frequent checks to ensure that the private company responsible for running the centres is complying with its obligations;

iv. to ensure that new arrivals are able to contact their families as quickly as possible, even during their stay on Lampedusa, particularly at the Loran base, where there are problems in this regard;

v. to provide appropriate reception facilities for unaccompanied minors, ensuring that they are not detained and are kept separate from adults;

vi. to clarify the legal basis for the *de facto* detention in the reception centres in Lampedusa;

vii. where Tunisians in particular are concerned, only to keep irregular migrants in administrative detention under a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review;

viii. to continue to guarantee the rapid transfer of new arrivals to reception centres elsewhere in Italy, even if their number were to increase;

ix. to consider the requests by the population of Lampedusa for support commensurate with the burden it has to bear, particularly in economic terms;

x. not to conclude bilateral agreements with the authorities of countries which are not safe and where the fundamental rights of the persons intercepted are not properly guaranteed, as in Libya.”

### C. Amnesty International

50. On 21 April 2011 Amnesty International published a report under the title “Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo”. The relevant passages of the report read as follows:

**“A humanitarian crisis of the Italian authorities’ own making**

...

Since January 2011, there has been an increasing number of arrivals on Lampedusa from North Africa. As of 19 April, over 27,000 people had arrived in Italy, mostly on the small island. Despite the significant increase in arrivals, and the predictability of ongoing arrivals in light of unfolding events in North Africa, the Italian authorities allowed the large number of arrivals on Lampedusa to accumulate until the situation on the island became unmanageable. Lampedusa is dependent on the mainland for provision of almost all basic goods and services and is not equipped to be a large reception and accommodation centre, albeit it does have the basics to function as a transit centre for smaller numbers of people.

...

**Lack of information about or access to asylum procedures**

Given that, at the time of Amnesty International’s visit on the island, UNHCR estimated that there were around 6,000 foreign nationals on Lampedusa, the number of people tasked with providing information regarding asylum was totally inadequate. As far as Amnesty International could determine, only a handful of individuals were providing basic information regarding asylum procedures, which was totally inadequate given the number of arrivals. Further, those arriving were provided with only a very brief medical assessment and a very basic screening. Moreover, there appeared to be an assumption that all Tunisian arrivals were economic migrants.

The fact that, at the time of Amnesty International’s visit, foreign nationals had not been given proper information about access to asylum procedures, and were not being properly identified or screened, is a particular concern. The delegation spoke with people who had been given no, or very inadequate, information about asylum processes; in many cases they had been given no information about their situation at all. They had not been told how long they would have to stay on the island or what their eventual destination would be once moved off the island. Given that many of those arriving on Lampedusa had already endured extremely dangerous sea voyages, including some whose fellow travellers had drowned at sea, the appalling conditions on the island and the almost total absence of information were clearly leading to considerable anxiety and mental stress.

In Amnesty International’s view the asylum and reception systems had completely broken down due to the severe overcrowding caused by the total failure to organize timely and orderly transfers off the island.

**Conditions in the ‘Centres’ of the island**

In Lampedusa, the Amnesty International delegation visited both the main centre at Contrada Imbriacola, registering and accommodating male adults, mainly from Tunisia, and the Base Loran Centre, accommodating children and new arrivals from Libya.

The main centre at Contrada Imbriacola is equipped to function as a transit centre for relatively small numbers of people; its full capacity is just over 800 individuals. On 30 March, Amnesty International delegates spoke with people being accommodated at the centre, as they entered and exited. The delegation was not able to access the centre itself at that time, but was given access the following day when the centre had just been emptied, as all individuals were being moved off the island.

Those who had been living at the centre described appalling conditions, including severe overcrowding and filthy, unusable sanitary facilities. Some people told Amnesty International delegates that they had chosen to sleep on the streets rather than in the centre because they considered it so dirty as to make it uninhabitable. Amnesty International subsequently spoke to the centre's Director who confirmed the overcrowding stating that, on 29 March, it accommodated 1,980 people, more than double its maximum capacity.

Although Amnesty International was only able to visit the centre after it had been emptied, the conditions that the delegation witnessed corroborated the reports of former inhabitants. Notwithstanding an ongoing clean-up operation at the time of the visit, there was an overwhelming smell of raw sewage. The remains of makeshift tents were observed in the centre. Piles of refuse were still evident around the centre.

...

**COLLECTIVE SUMMARY REMOVALS, REPORTEDLY OF TUNISIAN NATIONALS, FROM LAMPEDUSA, FROM 7 APRIL 2011 ONWARDS, FOLLOWING THE SIGNING OF AN AGREEMENT BETWEEN THE ITALIAN AND TUNISIAN AUTHORITIES**

Amnesty International is extremely concerned by the enforced removal that began on 7 April from Lampedusa, following the recent signing of an agreement between the Tunisian and Italian authorities. At the time of writing these forcible returns were ongoing and had reportedly been carried out twice a day by air since 11 April.

On 6 April, the Italian Ministry of Interior announced that Italy had signed an agreement with Tunisia pursuant to which the latter committed itself to strengthening border controls with a view to preventing departures, and to accepting the speedy readmission of people who had recently arrived and who will be arriving in Italy. Amnesty International is particularly concerned that, according to the above-mentioned announcement, Tunisian migrants arriving onto Italian shores may be 'repatriated directly' and with 'simplified procedures'.

In the light of this announcement, and given, in particular, Amnesty International's findings in relation to the total inadequacy of asylum procedures on Lampedusa, the organization believes that those people who have been subjected to 'direct repatriations' following 'simplified procedures' have been victims of collective summary removals.

As far as Amnesty International could ascertain, people have been removed from the island within one or two days of arrival. Thus, it appears highly unlikely that they would have had access to any meaningful or adequate opportunity to assert that they should not be returned to Tunisia on international protection or other grounds. In the circumstances those removals would amount to summary expulsions (cf. the judgments of the European Court of Human Rights in the case of *Hassanpour-Omrani v Sweden* and *Jabari v Turkey*). Such practices are strictly prohibited under international, regional and domestic human rights and refugee law and standards. Additionally human rights and refugee law and standards require that the removing State must provide an effective remedy against removal. Removing people without

giving them the chance of exercising their right to challenge their removal through an effective procedure gives rise *per se* to a human rights violation. This is independent of whether removal would place the individuals concerned at a real risk of serious human rights violations, which, in turn, would constitute a breach of the *non-refoulement* principle.

...”

## THE LAW

### I. PRELIMINARY OBJECTION

51. In a document of 9 July 2013 containing their additional observations and submissions on just satisfaction before the Chamber, the Government for the first time raised an objection that domestic remedies had not been exhausted, on the ground that the applicants had not appealed to the Italian judicial authorities against the refusal-of-entry orders.

52. The Chamber took the view that the Government were estopped from raising the objection that domestic remedies had not been exhausted. It pointed out that under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party, in so far as the nature of the objection and the circumstances so allowed, in its written or oral observations on the admissibility of the application (see *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). In the present case, the Government had not clearly raised an objection as to the non-exhaustion of domestic remedies in their observations of 25 September 2013 on the admissibility and merits, and the question of a failure by the applicants to lodge an appeal against the refusal-of-entry orders was raised only in their additional observations and submissions on just satisfaction. The Chamber further noted that the Government had not provided any explanation for that delay and that there was no exceptional circumstance capable of exempting them from their obligation to raise an objection to admissibility in a timely manner (see paragraphs 38 and 39 of the Chamber judgment).

53. The Grand Chamber does not see any reason to depart from the Chamber’s findings on that point. It further notes that during the proceedings before it the Government did not indicate any impediment by which they had been prevented from referring, in their initial observations of 25 September 2013 on the admissibility and merits of the case, to a failure by the applicants to challenge the refusal-of-entry orders.

54. It is therefore appropriate to confirm that the Government are estopped from relying on a failure to exhaust domestic remedies.

## II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

55. The applicants complained that they had been deprived of their liberty in a manner that was incompatible with Article 5 § 1 of the Convention, which reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

### A. Chamber judgment

56. The Chamber began by finding that the applicants had been deprived of their liberty within the meaning of Article 5 § 1 of the Convention. The applicants' allegation that they had been prohibited from leaving the CSPA and the ships *Vincent* and *Audace* was not in dispute (see paragraphs 46-51 of the Chamber judgment).

57. The Chamber then took the view that the deprivation of liberty imposed on the applicants fell under sub-paragraph (f) of the first paragraph of Article 5. However, it had no legal basis in Italian law. In that connection, the Chamber observed that Italian law did not provide for the detention of migrants placed in a CSPA. In addition, in his decision of 1 June 2012, the Palermo preliminary investigations judge had stated that the Agrigento police authority had merely registered the presence of the migrants in the CSPA without taking decisions ordering their detention. The Chamber explained that the existence of a practice of *de facto* detention of migrants in Italy had been confirmed by the reports of the Senate's Special Commission and the PACE Ad Hoc Sub-Committee. The April 2011 agreement between Italy and Tunisia had not been accessible to those

concerned and its consequences had therefore been unforeseeable. In the Chamber's view, it could not be established that the agreement provided for satisfactory safeguards against arbitrariness. The Chamber concluded in the light of the foregoing that the applicants' deprivation of liberty had not been "lawful" within the meaning of Article 5 § 1 of the Convention and that there had been a violation of that provision in the present case (paragraphs 66-73 of the Chamber judgment).

## **B. The Government's objection to the applicability of Article 5 § 1 of the Convention**

### *1. The parties' submissions*

#### **(a) The Government**

58. The Government argued in the first place that Article 5 was inapplicable in the present case as the applicants had not been deprived of their liberty. They had been received in a CSPA, a centre not designed for detention but to provide first aid and assistance (in terms of health and hygiene in particular) to all the migrants who arrived in Italy in 2011 for the time necessary to identify them, in accordance with the relevant Italian and European rules, and to proceed with their return. The applicants had then been transferred, for their own safety, to the ships *Vincent* and *Audace* – which, in the Government's submission, had to be regarded as the "natural extension of the CSPA" of Lampedusa – on account of the arson attack which had destroyed the centre (see paragraph 14 above).

59. Faced with a humanitarian and logistical emergency, the Italian authorities had been obliged to seek new premises which, in the Government's view, could not be regarded as places of detention or arrest. The surveillance of the CSPA by the Italian authorities was merely protective, in order to avoid criminal or harmful acts being committed by the migrants or against the local inhabitants. In the Government's view, the need for such surveillance had been shown by the subsequent events, in particular the above-mentioned arson attack and the clashes between local people and a group of migrants (see paragraph 26 above).

60. In the light of the foregoing, the Government argued, as they had done before the Chamber, that there had been neither "arrest" nor "detention" but merely a "holding" measure. The applicants had been rescued on the high seas and taken to the island of Lampedusa to assist them and to ensure their physical safety. The Government explained that the authorities had been obliged by law to save and identify the applicants, who had been in Italian territorial waters at the time their vessels had been intercepted by the coastguards. Any measure taken against the applicants could not therefore, in their view, be regarded as an arbitrary deprivation of liberty. On the contrary, the measures had been necessary to deal with a



situation of humanitarian emergency and to strike a fair balance between the safety of the migrants and that of the local inhabitants.

**(b) The applicants**

61. The applicants acknowledged that, under Italian law, the CSPAs were not detention centres but reception facilities. They argued, however, that this fact did not preclude the finding that, in practice, they had been deprived of their liberty in the Lampedusa CSPA and on the ships *Vincent* and *Audace*, in spite of the domestic law classification of the confinement. They observed that, to ascertain whether a person had been deprived of his or her liberty, the starting-point had to be his or her concrete situation and not the legal characterisation of the facility in question. Otherwise States would be able to implement forms of deprivation of liberty without any safeguards simply by classifying the premises in question as a “reception facility” rather than a “detention facility”.

62. The applicants pointed out that they had been held in a secure facility under the constant watch of the police for periods of nine and twelve days respectively without the possibility of leaving. That situation had been confirmed by the reports of the PACE Ad Hoc Sub-Committee (see paragraph 49 above) and of the Senate’s Special Commission (see paragraph 35 above). The Commission had reported prolonged periods of confinement, inability to communicate with the outside world and a lack of freedom of movement.

*2. Third-party intervention*

63. The Centre for Human Rights and Legal Pluralism of McGill University (“the McGill Centre”) observed that the facts of the case were similar to those in *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, 22 September 2009), where the Court had dismissed the respondent Government’s argument that the applicants had not been detained but accommodated.

*3. The Court’s assessment*

**(a) Principles laid down in the Court’s case-law**

64. The Court reiterates that, in proclaiming the right to liberty, the first paragraph of Article 5 is concerned with a person’s physical liberty and its aim is to ensure that no one should be dispossessed of such liberty in an arbitrary fashion (see *Medvedyev and Others v. France* [GC], no. 3394/03, § 73, ECHR 2010). The difference between deprivation of liberty and restrictions on freedom of movement under Article 2 of Protocol No. 4 is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task, in that some borderline cases are a

matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends (see *Guzzardi v. Italy*, 6 November 1980, §§ 92-93, Series A no. 39). In order to determine whether a person has been deprived of liberty, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Amuur v. France*, 25 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 115, ECHR 2012).

**(b) Application of those principles in the present case**

65. The Court begins by noting that the Government acknowledged that the Italian authorities had kept the CSPA at Contrada Imbriacola under surveillance (see paragraph 59 above) and did not dispute the applicants' allegation (see paragraph 62 above) that they were prohibited from leaving the centre and the ships *Vincent* and *Audace*.

66. Moreover, like the Chamber, the Court notes that in paragraph 54 of its report published on 30 September 2011 (see paragraph 49 above), the PACE Ad Hoc Sub-Committee found that “[d]espite the authorities’ claim that the Tunisians were not detainees because they were not in cells, ... the conditions to which they were subjected [in the Contrada Imbriacola centre] were similar to detention and deprivation of freedom”. It also stated that the migrants were, “[i]n practice, ... imprisoned there without access to a judge” (see §§ 54-55 of the report).

67. Similar observations can be found in the report of the Senate's Special Commission (see paragraph 35 above), which referred to the “prolonged confinement”, “inability to communicate with the outside world” and “lack of freedom of movement” of the migrants placed in the Lampedusa reception centres.

68. Before the Court, the Government did not adduce any material capable of calling into question the findings of those two independent bodies, one of which, the Senate's Special Commission, is an institution of the respondent State. Nor did the Government submit any information to suggest that the applicants were free to leave the Contrada Imbriacola CSPA. On the contrary, the applicants' version seems to be corroborated by the fact – not disputed by the Government – that when on 21 September 2011 they had managed to evade the police surveillance and reach the village of Lampedusa, they were stopped by the police and taken back to the reception centre (see paragraph 14 above). This suggests that the applicants were being held at the CSPA involuntarily (see, *mutatis mutandis*, *Stanev*, cited above, § 127).

69. Similar considerations apply to the ships *Vincent* and *Audace*, which, according to the Government themselves, were to be regarded as the “natural extension of the CSPA” (see paragraph 58 above). The Court finds

no evidence in the file to suggest that the applicants could have left the ships, not even when they were moored in Palermo harbour.

70. The Court notes, lastly, that the duration of the applicants' confinement in the CSPA and on the ships, lasting for about twelve days in the case of the first applicant and about nine days in that of the second and third applicants, was not insignificant.

71. In the light of the foregoing, the Court finds that the classification of the applicants' confinement in domestic law cannot alter the nature of the constraining measures imposed on them (see, *mutatis mutandis*, *Abdolkhani and Karimnia*, cited above, §§ 126-27). Moreover, the applicability of Article 5 of the Convention cannot be excluded by the fact, relied on by the Government, that the authorities' aim had been to assist the applicants and ensure their safety (see paragraphs 58-59 above). Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty. The Court observes that Article 5 § 1 authorises, in its sub-paragraph (d), the "detention of a minor by lawful order for the purpose of educational supervision" (see, for example, *Blokhin v. Russia* [GC], no. 47152/06, §§ 164-72, ECHR 2016, and *D.L. v. Bulgaria*, no. 7472/14, §§ 6 and 69-71, 19 May 2016) and in its sub-paragraph (e), the "lawful detention ... of persons of unsound mind, alcoholics or drug addicts or vagrants" (see, for example, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §§ 67-70, Series A no. 12; *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; and, in particular, *Witold Litwa v. Poland*, no. 26629/95, § 60, ECHR 2000-III).

72. Having regard to the restrictions imposed on the applicants by the authorities, the Court finds that the applicants were deprived of their liberty, within the meaning of Article 5, in the Contrada Imbriacola CSPA and on the ships *Vincent* and *Audace*, and that Article 5 is therefore applicable.

73. It follows that the Court has jurisdiction *ratione materiae* to examine the applicants' complaints under Article 5. The Government's objection in that connection must therefore be dismissed.

## C. Merits

### 1. *The parties' submissions*

#### (a) **The applicants**

74. According to the applicants, their deprivation of liberty had no legal basis. They observed that they had been held in closed facilities under constant police surveillance with the aim of "preventing them from unlawfully entering" Italy. They argued, however, that the authorities had not acted in accordance with the law, because no refusal-of-entry or removal procedure compliant with domestic law had been initiated against them; instead they had been returned using a simplified procedure provided for by

an agreement of 2011 between Italy and Tunisia (see paragraphs 36-40 above). They emphasised that their deprivation of liberty had not been justified by any judicial decision.

75. The applicants explained that under Italian law (Article 14 of Legislative Decree no. 286 of 1998, see paragraph 33 above), the only legal form of deprivation of liberty of an unlawful migrant awaiting return was placement in a CIE, subject to judicial supervision (validation of administrative detention decisions by a Justice of the Peace), as required by Article 5 of the Convention.

76. The applicants reiterated their observations before the Chamber. They argued in particular that, according to the legislation, the Lampedusa CSPA and the ships moored in Palermo harbour were not detention facilities but open reception facilities and that no form of validation of such placement by a judicial authority was provided for. By using the CSPA as a detention centre, Italy had removed the applicants' deprivation of liberty from any judicial supervision. The same could be said of their confinement on the ships.

77. The applicants also observed that the treatment to which they had been subjected could not be justified on the basis of Article 10 § 2 of Legislative Decree no. 286 of 1998 (see paragraph 33 above), which in their view provided for so-called "deferred" refusal of entry when an alien had entered Italy, "for purposes of public assistance". The above-cited Article 10 made no mention of deprivation of liberty or of any procedure for a possible confinement measure.

78. In so far as the Government had argued that the situation complained of had been prompted by an emergency, the applicants argued that the real source of the problems on the island had been the political decision to concentrate the confinement of aliens on Lampedusa. In their view there was no insurmountable organisational difficulty preventing the authorities from arranging a regular service for the transfer of migrants to other places in Italy. Moreover, they explained that to deprive aliens of their liberty without judicial oversight was not permitted by any domestic legislation, even in an emergency. Article 13 of the Constitution (see paragraph 32 above) provided that in exceptional cases of necessity and urgency, the administrative authority was entitled to adopt measures entailing deprivation of liberty; however, such measures had to be referred within forty-eight hours to a judicial authority, which had to validate them in the following forty-eight hours. In the present case the applicants submitted that they had been deprived of their liberty without any decision by an administrative authority and without validation by a judicial authority.

79. The applicants also noted that the conditions for derogation under Article 15 of the Convention were not met and that in any event Italy had not notified its intention to exercise its right of derogation. Accordingly, even if it were proven – contrary to the applicants' position – that the Italian

Government had been obliged, at the relevant time, to handle an unforeseeable and exceptional arrival of migrants, no conclusion could be drawn therefrom for the purposes of Article 5 of the Convention.

80. The applicants argued that, in spite of repeated criticisms from various national and international institutions, the procedure for managing the arrival of migrants as described in their application was still applied by the Italian authorities, with the result that there was a systemic and structural violation of the fundamental right to liberty of migrants and the courts had allowed it to continue. The applicants pointed out in this connection that from the autumn of 2015 onwards, the Lampedusa CSPA had been identified as one of the facilities where the so-called “hotspot” approach could be implemented, as recommended by the European Union, whereby migrants would be identified and asylum-seekers separated from economic migrants. In 2016 the Italian authorities had continued to run this facility as a secure centre where migrants were detained without any legal basis.

**(b) The Government**

81. The Government observed, as they had done before the Chamber, that the facts of the case did not fall within the scope of sub-paragraph (f) of Article 5 § 1 of the Convention; the applicants had not been held pending deportation or extradition, but had on the contrary been temporarily allowed to enter Italy. In that connection, the Government pointed out that the applicants had been accommodated in a CSPA, and not sent to a CIE. They explained that the legal conditions for placing the applicants in a CIE had not been fulfilled; in particular, no additional verification of their identity had been necessary in their view.

82. The Government acknowledged that, as indicated by the Palermo preliminary investigations judge in his decision of 1 June 2012 (see paragraphs 24-29 above), the domestic provisions in force did not expressly provide for a confinement measure in respect of migrants placed in a CSPA. Such a measure, under the supervision of the Justice of the Peace, was, however, provided for when migrants were placed in a CIE. The presence of the migrants in the CSPA had nevertheless been duly recorded. Moreover, each of the migrants had been issued with a refusal-of-entry and removal order, mentioning the date of their unlawful entry into Italy. Those orders had been duly notified to the migrants concerned. In the Government’s submission, they had not been referred to the Justice of the Peace because such supervision was only necessary in cases of deportation (*espulsione*) and not refusal of entry (*respingimento*).

83. At the hearing before the Court, the Government further alleged that the bilateral agreement between Italy and Tunisia (see paragraphs 36-40 above) could have constituted a legal basis for the holding of the applicants on the island of Lampedusa pending their prompt return. The aim of that

agreement had been to reinforce border controls and to facilitate the return of irregular migrants through simplified procedures; it had also been announced, for example, on the websites of the Italian Ministries of the Interior and of Foreign Affairs and on that of the Tunisian Government. In the Government's view, it would not be credible to suggest that the applicants, who had access to modern information technology, had not been aware of the return procedures applicable to them.

## 2. *Third-party intervention*

### (a) **AIRE Centre and ECRE**

84. The AIRE Centre and ECRE argued that, under Article 1 of the European Union's Charter of Fundamental Rights, any measures entailing the deprivation of liberty of migrants and the conditions of such detention had to ensure respect for their human dignity and for the principle of non-discrimination, regardless of the number of new arrivals and any situation of emergency that might arise in a given State. Moreover, recital 16 in the preamble to the Return Directive (see paragraph 41 above) stated as follows:

“The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient”.

In addition, States had to ensure that the necessary legal assistance and/or representation was granted at the migrant's request (Article 13 § 4 of the Return Directive).

85. The two third-party interveners observed that in its *Bashir Mohamed Ali Mahdi* judgment (case C-146/14 PPU, 5 June 2014), the CJEU had explained that the Return Directive, read in the light of Articles 6 and 47 of the Charter of Fundamental Rights, provided that any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, had to be in the form of a written measure that included the reasons in fact and in law for that decision. In addition, the review of the reasons for extending the detention of a third-country national had to be carried out on a case-by-case basis, applying the proportionality principle, to ascertain whether detention might be replaced with a less coercive measure or whether the migrant should be released. Lastly, the CJEU had found that the judicial authority had power to take into account the facts stated and evidence adduced by the administrative authority which had brought the matter before it, as well as any facts, evidence and observations which might be submitted to the judicial authority in the course of the proceedings.

**(b) The McGill Centre**

86. According to the McGill Centre, the principle of proportionality should guide the Court in its analysis of the arbitrary nature of a detention. The law and legal theory were lacking when it came to the status and protection applicable to irregular migrants who did not apply for asylum; this legal void made them particularly vulnerable. The United Nations Human Rights Committee had interpreted Article 9 of the International Covenant on Civil and Political Rights as incorporating a requirement of lawfulness and a broader protection against arbitrariness. It had specified that additional factors such as lack of cooperation or the possibility of absconding had to be present in order for the detention of an irregular migrant to be in conformity with Article 9, and that the existence of other, less invasive, means had to be taken into account (the intervening party referred, *inter alia*, to *C. v. Australia*, Communication no. 900/1999, UN document CCPRIC/76/D900/1999 (2002)). Similar principles, such as that of the proportionality of the detention in the light of the circumstances, were to be found in texts of the Council of Europe and EU directives, to the effect that detention should be used only as a measure of last resort.

87. The third-party intervener argued that the detention had to be based on a clear and certain legal basis or on a valid judicial decision, with the possibility of effective and rapid judicial supervision as to its conformity with national and international law. While the Court had been careful not to impose an excessive burden on States dealing with significant migratory flows, it nevertheless should only find the detention of migrants to be proportionate where there were no other, less invasive, means of achieving the aim pursued. The Court had taken a step in that direction in the case of *Rusu v. Austria* (no. 34082/02, 2 October 2008), where, as there was no indication that the applicant had any intention of staying illegally in Austria or that she would not have cooperated in the removal process, it had found the detention to be arbitrary.

*3. The Court's assessment*

**(a) Principles established in the Court's case-law**

88. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. Moreover, only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see, among many other authorities, *Giulia Manzoni v. Italy*, 1 July 1997, § 25, Reports 1997-IV; *Labita v. Italy* [GC], no. 26772/95, § 170,

ECHR 2000-IV; *Velinov v. the former Yugoslav Republic of Macedonia*, no. 16880/08, § 49, 19 September 2013; and *Blokhin*, cited above, § 166).

89. One of the exceptions, contained in sub-paragraph (f) of Article 5 § 1, permits the State to control the liberty of aliens in an immigration context (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008; *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162-163, ECHR 2009; and *Abdolkhani and Karimnia*, cited above, § 128).

90. Article 5 § 1 (f) does not require the detention to be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. However, any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified only as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with “due diligence”, the detention will cease to be permissible under Article 5 § 1 (f) (see *A. and Others v. the United Kingdom*, cited above, § 164).

91. The deprivation of liberty must also be “lawful”. Where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of that law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244; *Stanev*, cited above, § 143; *Del Río Prada v. Spain* [GC], no. 42750/09, § 125, ECHR 2013; and *L.M. v. Slovenia*, no. 32863/05, § 121, 12 June 2014). In laying down that any deprivation of liberty must be effected “in accordance with a procedure prescribed by law”, Article 5 § 1 primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention (see *Amuur*, cited above, § 50, and *Abdolkhani and Karimnia*, cited above, § 130).

92. On this last point, the Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII; *Ječius v. Lithuania*,



no. 34578/97, § 56, ECHR 2000-IX; *Paladi v. Moldova* [GC], no. 39806/05, § 74, 10 March 2009; and *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009).

**(b) Application of those principles in the present case**

*(i) The applicable rule*

93. The Court must first determine whether the applicants' deprivation of liberty was justified under one of the sub-paragraphs of Article 5 § 1 of the Convention. As the list of permissible grounds on which persons may be deprived of their liberty is exhaustive, any deprivation of liberty which does not fall within one of the sub-paragraphs of Article 5 § 1 of the Convention will inevitably breach that provision (see, in particular, the case-law cited in paragraph 88 above).

94. The Government, arguing that the applicants were not awaiting deportation or extradition, took the view that the facts of the case did not fall within sub-paragraph (f) of Article 5 § 1 of the Convention, which authorised a person's "lawful arrest or detention ... to prevent his effecting an unauthorised entry into the country" or when "deportation or extradition" proceedings were pending against the person (see paragraph 81 above). The Government did not, however, indicate under which other sub-paragraph of Article 5 the deprivation of liberty could be justified in the applicants' case.

95. The applicants were of the view, however, that they had been deprived of their liberty with the aim of "prevent[ing them from] effecting an unauthorised entry into" Italy (see paragraph 74 above).

96. Like the Chamber, and in spite of the Government's submission and the classification of the applicants' return in domestic law, the Court is prepared to accept that the deprivation of liberty in the applicants' case fell within sub-paragraph (f) of Article 5 § 1 (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, § 38, ECHR 2002-I). In that connection it observes that the applicants had entered Italy and that the refusal-of-entry orders concerning them (see paragraph 19 above) had stated expressly that they had entered the country by evading border controls, and therefore unlawfully. Moreover, the procedure adopted for their identification and return manifestly sought to address that unlawful entry.

*(ii) Whether there was a legal basis*

97. It must now be determined whether the applicants' detention had a legal basis in Italian law.

98. It is not in dispute between the parties that only Article 14 of the "Consolidated text of provisions concerning immigration regulations and rules on the status of aliens" (Legislative Decree no. 286 of 1998 – see paragraph 33 above) authorises, on the order of the Chief of Police, the detention of a migrant "for as long as is strictly necessary". However, that

provision applies only where removal by escorting the person to the border or a refusal-of-entry measure cannot be implemented immediately, because it is necessary to provide assistance to the alien, to conduct additional identity checks, or to wait for travel documents or the availability of a carrier. As a result, migrants in this category are placed in a CIE. However, the Government themselves have admitted that the legal conditions for placement of the applicants in a CIE were not fulfilled, so they were not held in such a facility (see paragraph 81 above).

99. It follows that Article 14 of Legislative Decree no. 286 of 1998 could not have constituted the legal basis for the applicants' deprivation of liberty.

100. The Court now turns to the question whether such basis could be found in Article 10 of Legislative Decree no. 286 of 1998 (see paragraph 33 above). This provision provides for the refusal of entry and removal of, among other categories of alien, those allowed to remain temporarily in Italy on public assistance grounds. The Court has not found any reference therein to detention or other measures entailing deprivation of liberty that could be implemented in respect of the migrants concerned. Indeed, the Government have not disputed this.

101. In those circumstances the Court does not see how the above-mentioned Article 10 could have constituted the legal basis for the applicants' detention.

102. To the extent that the Government take the view that the legal basis for holding the applicants on the island of Lampedusa was the bilateral agreement between Italy and Tunisia of April 2011 (see paragraph 83 above), the Court would note at the outset that the full text of that agreement had not been made public. It was therefore not accessible to the applicants, who accordingly could not have foreseen the consequences of its application (see in particular the case-law cited in paragraph 92 above). Moreover, the press release published on the website of the Italian Ministry of the Interior on 6 April 2011 merely referred to a strengthening of the border controls and the possibility of the immediate return of Tunisian nationals through simplified procedures (see paragraphs 37-38 above). It did not, however, contain any reference to the possibility of administrative detention or to the related procedures.

103. The Court further notes that the Government, in an annex to their request for referral to the Grand Chamber, produced for the first time a *note verbale* concerning another bilateral agreement with Tunisia, preceding that of April 2011 and dating back to 1998 (see paragraph 40 above). Even though that agreement does not seem to be the one applied to the applicants, the Court has examined the *note verbale* in question. It has not, however, found any reference in it to cases where irregular migrants might be subjected to measures depriving them of their liberty. Point 5 of Chapter II of the *note verbale* merely indicates that interviews could be carried out at

the court office, or in the reception centre or medical facility where the persons concerned were legally residing, without adding any clarification. In those circumstances it is difficult to understand how the scant information available as to the agreements entered into at different times between Italy and Tunisia could have constituted a clear and foreseeable legal basis for the applicants' detention.

104. The Court would further observe that its finding that the applicants' detention was devoid of legal basis in Italian law has been confirmed by the report of the Senate's Special Commission (see paragraph 35 above). The Special Commission noted that stays at the Lampedusa centre, which in principle should have been limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his or her presence in Italy, sometimes extended to over twenty days "without there being any formal decision as to the legal status of the person being held". According to the Special Commission, such prolonged confinement, "without any legal or administrative measure" providing for it, had led to "heightened tension". It should also be noted that the PACE Ad Hoc Sub-Committee expressly recommended that the Italian authorities "clarify the legal basis for the *de facto* detention in the reception centres in Lampedusa", and where Tunisians in particular were concerned, that they should "keep irregular migrants in administrative detention only under a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review" (see § 92, (vi) and (vii), of the report published on 30 September 2011, cited in paragraph 49 above).

105. In the light of the legal situation in Italy and the foregoing considerations, the Court takes the view that persons placed in a CSPA, which is formally regarded as a reception facility and not a detention centre, could not have the benefit of the safeguards applicable to placement in a CIE, which for its part had to be validated by an administrative decision subject to review by the Justice of the Peace. The Government did not allege that such a decision had been adopted in respect of the applicants and, in his decision of 1 June 2012, the Palermo preliminary investigations judge stated that the Agrigento police authority had merely registered the presence of the migrants in the CSPA without ordering their placement and that the same was true for the migrants' transfer to the ships (see paragraphs 25-26 above). Consequently, the applicants were not only deprived of their liberty without a clear and accessible legal basis, they were also unable to enjoy the fundamental safeguards of *habeas corpus*, as laid down, for example, in Article 13 of the Italian Constitution (see paragraph 32 above). Under that provision, any restriction of personal liberty has to be based on a reasoned decision of the judicial authority, and any provisional measures taken by a police authority, in exceptional cases of necessity and urgency, must be validated by the judicial authority within forty-eight hours. Since the

applicants' detention had not been validated by any decision, whether judicial or administrative, they were deprived of those important safeguards.

106. In the light of the foregoing, the Court finds that the provisions applying to the detention of irregular migrants were lacking in precision. That legislative ambiguity has given rise to numerous situations of *de facto* deprivation of liberty and the fact that placement in a CSPA is not subject to judicial supervision cannot, even in the context of a migration crisis, be compatible with the aim of Article 5 of the Convention: to ensure that no one should be deprived of his or her liberty in an arbitrary fashion (see, among many other authorities, *Saadi*, cited above, § 66).

107. Those considerations are sufficient for the Court to find that the applicants' deprivation of liberty did not satisfy the general principle of legal certainty and was not compatible with the aim of protecting the individual against arbitrariness. It cannot therefore be regarded as "lawful" within the meaning of Article 5 § 1 of the Convention.

108. Accordingly, there has been a violation of Article 5 § 1 of the Convention in the present case.

### III. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

109. The applicants complained that they had not had any kind of communication with the Italian authorities throughout their stay in Italy.

They relied on Article 5 § 2 of the Convention, which reads as follows:

"2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

#### A. Chamber judgment

110. The Chamber observed that the applicants had most probably been made aware of their status as irregular migrants but found that basic information as to the legal status of a migrant did not satisfy the requirements of Article 5 § 2 of the Convention, under which the legal and factual grounds for the deprivation of liberty had to be notified to the person concerned. The Chamber further noted that the Government had failed to produce any official document addressed to the applicants containing such information. Moreover, the refusal-of-entry orders, which made no mention of the applicants' detention, were apparently notified only on 27 and 29 September 2011, respectively, whereas the applicants had been placed in the CSPA on 17 and 18 September. Thus they had not been provided with the information "promptly" as required by Article 5 § 2. The Chamber thus concluded that there had been a violation of this provision (see paragraphs 82-85 of the Chamber judgment).

## **B. The parties' submissions**

### *1. The applicants*

111. The applicants observed that the refusal-of-entry orders had been adopted only at the time of the enforcement of their return, and thus only at the end of the period of detention. Consequently, they took the view that, even assuming that those orders had been notified to them, the guarantee of being informed “promptly” under Article 5 § 2 of the Convention had not been observed. In addition, those orders had merely set out in a summary and standardised manner the legal basis for the refusal-of-entry measure, but had made no mention, not even implicitly, of the reasons for their detention pending removal.

112. The applicants further took the view that the information provided for in Article 5 § 2 had to emanate from the authority carrying out the arrest or placement in detention – or, in any event, from official sources. During their deprivation of liberty they had had no contact with the authorities, not even orally, concerning the reasons for their detention. The fact that members of non-governmental organisations had been able to communicate with the migrants on this subject could not, in their view, satisfy the requirements of that provision.

### *2. The Government*

113. The Government asserted that the applicants had been informed in a language which they understood, by police officers present on the island, assisted by interpreters and cultural mediators, of their status, which was that of Tunisian citizens temporarily admitted to Italian territory for reasons of “public assistance”, in accordance with Article 10 § 2 (b) of Legislative Decree no. 286 of 1998 (see paragraph 33 above). In their view, that status had automatically entailed the applicants' return to Tunisia, as provided for in the refusal-of-entry and removal orders. In any event, the members of the organisations which had access to the CSPA at Contrada Imbriacola had informed the migrants about their situation and the possibility of their imminent removal.

## **C. Third-party intervention**

114. The McGill Centre observed that the right to be informed of the reason for detention was necessary in order to be able to challenge the lawfulness of the measure. The United Nations working group on arbitrary detention required that the information given to the detainee at the time of his or her arrest had to explain how the detention could be challenged. The Centre added that the lawfulness of the detention had to be open to regular review when it was extended.

## D. The Court's assessment

### 1. Principles established in the Court's case-law

115. Paragraph 2 of Article 5 lays down an elementary safeguard: any person who has been arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: any person who has been arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his deprivation of liberty, so as to be able to apply to a court to challenge its lawfulness in accordance with paragraph 4 (see *Van der Leer v. the Netherlands*, 21 February 1990, § 28, Series A no. 170-A, and *L.M. v. Slovenia*, cited above, §§ 142-43). Whilst this information must be conveyed “promptly”, it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 40, Series A no. 182, and *Čonka*, cited above, § 50).

116. In addition, the Court has previously held that the requirement of prompt information is to be given an autonomous meaning extending beyond the realm of criminal law measures (see *Van der Leer*, cited above, §§ 27-28, and *L.M. v. Slovenia*, cited above, § 143).

### 2. Application of those principles in the present case

117. The Court would observe that it has already found, under Article 5 § 1 of the Convention, that the applicants' detention had no clear and accessible legal basis in Italian law (see paragraphs 93-108 above). In those circumstances the Court fails to see how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or thus have provided them with sufficient information to enable them to challenge the grounds for the measure before a court.

118. It is highly probable, of course, that the applicants were aware that they had entered Italy unlawfully. As the Chamber rightly pointed out, the very nature of their journey, on rudimentary vessels (see paragraph 11 above), and the fact that they had not applied for entry visas, indicated that they had sought to circumvent immigration laws. Moreover, the PACE Ad Hoc Sub-Committee observed that the Tunisians with whom its members had spoken “were perfectly aware that they had entered Italian territory illegally” (see § 56 of the report published on 30 September 2011, cited in paragraph 49 above). Lastly, there is no reason to contradict the Government's statement that the applicants had been informed, in a language they understood, by police officers on the island, assisted by interpreters and cultural mediators, that they had been temporarily allowed

to enter Italy for purposes of “public assistance”, with the prospect of their imminent return (see paragraph 113 above). Nevertheless, information about the legal status of a migrant or about the possible removal measures that could be implemented cannot satisfy the need for information as to the legal basis for the migrant’s deprivation of liberty.

119. Similar considerations apply to the refusal-of-entry orders. The Court has examined those documents (see paragraph 19 above), without finding any reference in them to the applicants’ detention or to the legal and factual reasons for such a measure. The orders in question merely stated that they had “entered the territory of the country by evading the border controls” and that they were to be returned.

120. It should also be observed that the refusal-of-entry orders were apparently notified to the applicants very belatedly, on 27 and 29 September 2011, respectively, although they had been placed in the CSPA on 17 and 18 September (see paragraphs 19-20 above). Consequently, even if the orders had contained information as to the legal basis for the detention, which was not the case, they would not in any event have satisfied the requirement of promptness (see, *mutatis mutandis*, *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 416, ECHR 2005-III, and *L.M. v. Slovenia*, cited above, § 145, where the Court found that an interval of four days fell outside the time constraints imposed by the notion of promptness for the purposes of Article 5 § 2).

121. The Court lastly notes that, apart from the refusal-of-entry orders, the Government have not adduced any document capable of satisfying the requirements of Article 5 § 2 of the Convention.

122. The foregoing considerations suffice for it to conclude that, in the present case, there has been a violation of Article 5 § 2.

#### IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

123. The applicants alleged that at no time had they been able to challenge the lawfulness of their deprivation of liberty.

They relied on Article 5 § 4 of the Convention, which reads as follows:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

##### A. The Chamber judgment

124. The Chamber found that, since the applicants had not been informed of the reasons for their deprivation of liberty, their right to have its lawfulness decided had been deprived of all effective substance. This consideration sufficed for the Chamber to find that there had been a

violation of Article 5 § 4 of the Convention. It additionally observed that the refusal-of-entry orders did not mention the legal or factual basis for the applicants' detention and that the orders had been notified to the applicants shortly before their return by plane, and therefore at a time when their deprivation of liberty had been about to end. Accordingly, even assuming that the lodging of an appeal against those orders with the Justice of the Peace could be regarded as affording an indirect review of the lawfulness of the detention, such an appeal could not have been lodged until it was too late (see paragraphs 95-98 of the Chamber judgment).

## **B. The parties' submissions**

### *1. The applicants*

125. The applicants did not deny that there had been a possibility of appealing against the refusal-of-entry orders, but submitted that they had not been able to challenge the lawfulness of their detention. No decision justifying their deprivation of liberty had been adopted or notified to them; accordingly, it had not been open to them to challenge any such decision in a court. In addition, the refusal-of-entry orders had not concerned their liberty, but rather their removal, and had been adopted at the end of their period of detention.

### *2. The Government*

126. The Government noted that the refusal-of-entry orders had indicated that it was open to the applicants to lodge an appeal with the Justice of the Peace in Agrigento (see paragraph 19 above). Some other Tunisian migrants had in fact used that remedy, and in 2011 the Justice of the Peace had annulled two refusal-of-entry orders (see paragraphs 30-31 above) as a result. The Government concluded that the applicants had certainly had the possibility of applying to a court to challenge the lawfulness of their alleged deprivation of liberty.

127. At the hearing before the Court, the Government further argued that since the applicants had been accommodated in the CSPA and on board the ships for reasons of assistance, no judicial review of their detention had been necessary.

## **C. The Court's assessment**

### *1. Principles established in the Court's case-law*

128. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. The notion of



“lawfulness” under paragraph 4 of Article 5 has the same meaning as in paragraph 1, such that a detained person is entitled to a review of the “lawfulness” of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the “lawful” detention of a person according to Article 5 § 1 (see *E. v. Norway*, 29 August 1990, § 50, Series A no. 181-A). The reviewing “court” must not have merely advisory functions but must have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful (see *Ireland v. the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v. the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v. the United Kingdom*, 15 November 1996, § 130, *Reports* 1996-V; and *A. and Others v. the United Kingdom*, cited above, § 202).

129. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not the Court’s task to inquire into what would be the most appropriate system in the sphere under examination (see *Shtukurov v. Russia*, no. 44009/05, § 123, ECHR 2008, and *Stanev*, cited above, § 169).

130. The existence of the remedy must nevertheless be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness (see *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII, and *Abdolkhani and Karimnia*, cited above, § 139).

131. Article 5 § 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided “speedily” by a court and to have their release ordered if the detention is not lawful (see, for example, *Baranowski*, cited above, § 68). Proceedings concerning issues of deprivation of liberty require particular expedition (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 79, ECHR 2003-IV), and any exceptions to the requirement of “speedy” review of the lawfulness of a measure of detention call for strict interpretation (see *Lavrentiadis v. Greece*, no. 29896/13, § 45, 22 September 2015). The question whether the principle of speedy proceedings has been observed is not to be addressed in the abstract but in the context of a general assessment of the information, taking into account the circumstances of the case (see *Luberti v. Italy*, 23 February 1984, §§ 33-37, Series A no. 75; *E. v. Norway*, cited above, § 64; and *Delbec v. France*, no. 43125/98, § 33, 18 June 2002), particularly in the light of the complexity of the case, any specificities of the domestic

procedure and the applicant's behaviour in the course of the proceedings (see *Bubullima v. Greece*, no. 41533/08, § 27, 28 October 2010). In principle, however, since the liberty of the individual is at stake, the State must ensure that the proceedings are conducted as quickly as possible (see *Fuchser v. Switzerland*, no. 55894/00, § 43, 13 July 2006, and *Lavrentiadis*, cited above, § 45).

## 2. Application of those principles in the present case

132. In cases where detainees had not been informed of the reasons for their deprivation of liberty, the Court has found that their right to appeal against their detention was deprived of all effective substance (see, in particular, *Shamayev and Others*, cited above, § 432; *Abdolkhani and Karimnia*, cited above, § 141; *Dbouba v. Turkey*, no. 15916/09, § 54, 13 July 2010; and *Musaev v. Turkey*, no. 72754/11, § 40, 21 October 2014). Having regard to its finding, under Article 5 § 2 of the Convention, that the legal reasons for the applicants' detention in the CSPA and on the ships had not been notified to them (see paragraphs 117-22 above), the Court must reach a similar conclusion under this head.

133. This consideration suffices for the Court to conclude that the Italian legal system did not provide the applicants with a remedy whereby they could obtain a judicial decision on the lawfulness of their deprivation of liberty (see, *mutatis mutandis*, *S.D. v. Greece*, no. 53541/07, § 76, 11 June 2009) and makes it unnecessary for the Court to determine whether the remedies available under Italian law could have afforded the applicants sufficient guarantees for the purposes of Article 5 § 4 of the Convention (see, for example and *mutatis mutandis*, *Shamayev and Others*, cited above, § 433).

134. As an additional consideration, and in response to the Government's argument to the effect that an appeal to the Agrigento Justice of the Peace against the refusal-of-entry orders met the requirements of Article 5 § 4 of the Convention (see paragraph 126 above), the Court would note, first, that the refusal-of-entry orders did not make any reference to the applicants' detention or to the legal or factual reasons for such a measure (see paragraph 119 above), and secondly that the orders were only notified to the applicants when it was too late, on 27 and 29 September 2011 respectively (see paragraph 120 above), shortly before they were returned by plane. This was rightly pointed out by the Chamber. It follows that the orders in question cannot be regarded as the decisions on which the applicants' detention was based, and the lodging of an appeal against them with the Justice of the Peace could not, in any event, have taken place until after the applicants' release on their return to Tunisia.

135. There has thus been a violation of Article 5 § 4 of the Convention.

## V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

136. The applicants argued that they had sustained inhuman and degrading treatment during their detention in the CSPA at Contrada Imbriacola on the island of Lampedusa and on board the ships *Vincent* and *Audace* moored in Palermo harbour.

They relied on Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

### A. The Chamber judgment

137. The Chamber began by noting that, following the events surrounding the “Arab Spring”, in 2011 the island of Lampedusa had been facing an exceptional situation characterised by mass arrivals of migrants and a humanitarian crisis, burdening the Italian authorities with many obligations and creating organisational and logistical difficulties (see paragraphs 124-27 of the Chamber judgment). However, in the Chamber’s view, those factors could not release the respondent State from its obligation to secure to the applicants conditions of confinement that were compatible with respect for their human dignity, having regard to the absolute nature of the Article 3 rights (see paragraph 128 of the Chamber judgment).

138. The Chamber then found it appropriate to deal separately with the conditions in the CSPA and on the ships (see paragraph 129 of the Chamber judgment). As to the first situation, it took the view that the applicants’ allegations about the overcrowding problem and general insalubrity of the CSPA were corroborated by the reports of the Senate’s Special Commission, Amnesty International and the PACE Ad Hoc Sub-Committee, thus finding a violation of Article 3 of the Convention, in spite of the short duration of their confinement – between two and three days (see paragraphs 130-36 of the Chamber judgment).

139. The Chamber reached the opposite conclusion as to the applicants’ detention on the ships. It observed that the applicants had been held on the ships for between six and eight days, and that the allegations of poor conditions had been at least partly contradicted by the decision dated 1 June 2012 of the Palermo preliminary investigations judge, whose findings were in turn based on the observations of a member of parliament who had visited the ships and had talked to some of the migrants. In the Chamber’s view, the fact that the MP had been accompanied by the deputy chief of police and police officers did not, in itself, cast doubt on his independence or on the veracity of his account. The Chamber thus found that there had been no violation of Article 3 under this head (see paragraphs 137-44 of the Chamber judgment).

## **B. The parties' submissions**

### *1. The applicants*

#### **(a) The existence of a humanitarian emergency and its consequences**

140. The applicants argued that the exceptional situation of humanitarian emergency alleged by the Government (see paragraphs 150-51 below) could not justify the treatment of which they were victims, either in terms of domestic legislation or under the Convention. Moreover, the mass arrival of migrants on Lampedusa in 2011 had not been an exceptional situation. A similar influx had occurred before the “Arab Spring” and the decision to restrict the initial accommodation of migrants to the island of Lampedusa had sought to give the public the impression of an “invasion” of Italian territory, to be exploited for political ends. The media and the national and international human rights bodies (the applicants referred in particular to the Amnesty International report, see paragraph 50 above) had established that the crisis situation on the island of Lampedusa had arisen well before 2011. In those circumstances, they argued, it could not be concluded that the situation complained of was primarily the result of the urgency of having to deal with the significant influx of migrants following the “Arab Spring”.

141. In any event, the applicants argued that a State such as Italy had the means necessary to transfer migrants rapidly to other places. The conditions in the Lampedusa CSPA had remained atrocious even after 2011, and the migration crisis had continued in the following years, thus showing the systemic and structural nature of the violation of the migrants' rights.

#### **(b) Conditions in the CSPA at Contrada Imbriacola**

142. The applicants alleged that the Lampedusa CSPA was overcrowded. The figures produced by the Government showed that at the relevant time this facility had housed over 1,200 individuals, amounting to three times the centre's normal capacity (381 spaces), but also well above its maximum capacity in case of necessity (804 spaces). Those figures had in fact indicated the presence of 1,357 individuals on 16 September 2011, 1,325 individuals on 17 September, 1,399 on 18 September, 1,265 on 19 September and 1,017 on 20 September. The conditions of hygiene and sanitation had been unacceptable in the applicants' view, as shown by photographs and by reports of national and international bodies. In particular, owing to a lack of space in the rooms, the applicants alleged that they had been obliged to sleep outside, directly on the concrete floor, to avoid the stench from the mattresses. In their submission, they had had to eat their meals while sitting on the ground, since the CSPA had no canteen, and the toilets were in an appalling state and were often unusable. Both in the CSPA and on the ships the applicants had experienced mental distress on account of the lack of any information about their legal status and the

length of their detention, and had also been unable to communicate with the outside world. Acts of self-harm by migrants held in the CSPA showed the state of tension which prevailed inside the facility.

143. The applicants pointed out that the CSPA was theoretically intended to function as a facility for assistance and initial reception. In their view, that type of centre, which did not comply with the European Prison Rules of 11 January 2006, was unsuitable for extended stays in a situation of deprivation of liberty. In their submission, a violation of Article 3 of the Convention could not be excluded either on account of the nature of the CSPA or in view of the short duration of their detention. The duration in question was only one of the factors to be taken into consideration in assessing whether treatment exceeded the threshold of severity required for it to fall within the scope of Article 3. The Court had previously found violations of Article 3 of the Convention even in the case of very short periods of detention where there were other aggravating factors such as particularly appalling conditions or the vulnerability of the victims (the applicants referred to *Brega v. Moldova*, no. 52100/08, 20 April 2010; *T. and A. v. Turkey*, no. 47146/11, 21 October 2014; and *Gavrilovici v. Moldova*, no. 25464/05, 15 December 2009, concerning periods of forty-eight hours, three days and five days respectively). The applicants argued that the same factors were present in their cases and pointed out that at the material time they had just survived a dangerous crossing of the Mediterranean by night in a rubber dinghy, and that this had weakened them physically and psychologically. They had thus been in a situation of vulnerability, accentuated by the fact that their deprivation of liberty had no legal basis, and their mental distress had increased as a result.

144. The applicants explained that they were not complaining of having been beaten, but about the conditions of their detention in the CSPA. Accordingly, the Government's argument that they should have produced medical certificates (see paragraph 156 below) was not pertinent.

**(c) The conditions on the ships *Vincent and Audace***

145. As to their confinement on the ships, the applicants complained that they had been placed in a seriously overcrowded lounge and that they had only been allowed outside in the open air, on small decks, for a few minutes each day. They had been obliged to wait several hours to use the toilets and meals had been distributed by throwing the food on the floor.

146. The applicants disagreed with the Chamber's findings and alleged that the psychological stress suffered on the ships had been worse than in the CSPA on Lampedusa. The duration of their deprivation of liberty on the ships had been longer than in the CSPA and had followed on from that initial negative experience. In addition, on the ships the applicants had not received any relevant information or explanation and, according to them, the police had occasionally ill-treated or insulted them.

147. In the applicants' submission, in view of the nature of the ships (which they described as secluded and inaccessible places), it was for the Government to adduce evidence as to what had happened on board. It would be difficult to imagine that the authorities had been able to guarantee better living conditions than those in the CSPA, which was designed to accommodate migrants. The description about beds with clean sheets, the availability of spare clothing, and the access to private cabins and hot water, was also quite implausible. The Government had merely produced a decision of the Palermo preliminary investigations judge (see paragraphs 24-29 above), which was based on the statements of an MP taken only from a newspaper article and not reiterated at the hearing. It had to be borne in mind, in their view, that the police presence during the visit of the MP called into question the reliability of the migrants' statements to him as they may have feared reprisals. The Government had failed to produce any document attesting to the services allegedly provided on the ships or any contracts with the companies from which they were leased. Lastly, the Italian authorities had not responded to the appeal by Médecins sans Frontières on 28 September 2011, in which that NGO had expressed its concerns and asked to be allowed to carry out an inspection on the ships.

## *2. The Government*

### **(a) The existence of a humanitarian emergency and its consequences**

148. The Government submitted that they had monitored the situation on Lampedusa in the period 2011-2012 and had intervened on a factual and legislative level to coordinate and implement the measures required to provide the migrants with aid and assistance. The active presence on the island of the Office of the United Nations High Commissioner for Refugees (UNHCR), the IOM, Save the Children, the Order of Malta, the Red Cross, Caritas, the ARCI (Associazione Ricreativa e Culturale Italiana) and the Community of Sant'Egidio had been placed within the framework of the "Praesidium Project", financed by Italy and by the European Union. The representatives of those organisations had had unrestricted access to the migrants' reception facilities. In addition, on 28 May 2013 the Government had signed a memorandum of agreement with the Terre des hommes Foundation, which provided a service of psychological support at the Lampedusa CSPA. On 4 June 2013 the Ministry of the Interior had signed an agreement with the European Asylum Support Office (EASO) to coordinate the reception arrangements for migrants. Medical assistance had been available at all times to the migrants and, since July 2013, the association Médecins sans Frontières had begun to help train the staff at the CSPA and on the ships responsible for rescue at sea.

149. According to the Government, the rescue of migrants arriving on the Italian coast was a problem not only for Italy but for all the member States of the European Union, which had to establish a proper common policy to deal with it. The local institutions in Lampedusa had financed the construction of new aid and assistance centres (6,440,000 euros (EUR) had been invested to create facilities capable of accommodating 1,700 persons). During his visit on 23 and 24 June 2013, the UNHCR representative for Southern Europe had noted with satisfaction the steps taken by the national and local authorities in order to improve the general situation on the island.

150. The Government explained that in 2011 the massive influx of North African migrants had created a situation of humanitarian emergency in Italy. From 12 February to 31 December 2011, 51,573 nationals of countries outside the European Union (about 46,000 men, 3,000 women and 3,000 children) had landed on the islands of Lampedusa and Linosa. Over 26,000 of those individuals had been Tunisian nationals. That situation was well explained in the report of the PACE Ad Hoc Sub-Committee (see paragraph 49 above), which had also reported on the efforts of the Italian authorities, in cooperation with other organisations, to create the necessary facilities for the reception and assistance of migrants, some of whom were vulnerable individuals.

151. In the Government's opinion, in view of the many demands on States in situations of humanitarian emergency, the Court had to adopt a "realistic, balanced and legitimate approach" when it came to deciding on the "application of ethical and legal rules".

**(b) Conditions at the Contrada Imbriacola CSPA**

152. The Government stated that, during the relevant period, the CSPA at Contrada Imbriacola had been fully operational and had had the necessary human and material resources to provide aid and initial accommodation to migrants. In addition to the director and two deputy directors, the centre employed ninety-nine "social operators" and cleaning staff, three social workers, three psychologists, eight interpreters and cultural mediators, eight administrative staff and three division managers responsible for supervising activities in the facility. Three doctors and three nurses provided medical assistance in a temporary unit. According to the results of an inspection carried out on 2 April 2011 by the Palermo health services, the conditions of hygiene were satisfactory, and so was the quality and quantity of the food provided. A further inspection immediately after the fire of 20 September 2011 reported that drinking water was provided in bottles and that the canteen was serving meals. Before being transferred to the Lampedusa CSPA, the applicants had undergone a medical examination which showed that they were in good health. Furthermore, minors and particularly vulnerable individuals had been separated from the other migrants and taken

to the centre of Loran (see § 31 of the PACE report of 30 September 2011, cited in paragraph 49 above).

153. At the hearing before the Court, the Government pointed out that the migrants accommodated in the Contrada Imbriacola CSPA had been able: (a) to move around freely inside the facility; (b) to have access to all the services available (medical assistance, clothing, food, water and sanitary facilities); (c) to communicate with the outside world and make purchases (on their arrival they had received a telephone card worth EUR 15 and vouchers to be used in the centre); and (d) to have contact with representatives of humanitarian organisations and lawyers. In the Government's view the centre, which could accommodate up to 1,000 individuals, was not overcrowded. At the hearing before the Court the Government observed that during the applicants' stay there, 917 migrants had been accommodated in the CSPA at Contrada Imbriacola.

154. In the light of the foregoing, the Government submitted that the applicants had not been subjected to any inhuman or degrading treatment, "because they were not considered to be under arrest or in custody but were simply being assisted pending their return to Tunisia". The applicants themselves had acknowledged that under Italian law the CSPA was designed for reception, and they had not claimed to have been physically injured there or otherwise ill-treated by the police or the centre's staff. The Chamber had not duly taken account of the criminal offences which had required the intervention of the local authorities to rescue the migrants and ensure their safety. The Government further emphasised that the applicants had only remained on Lampedusa for a short period.

**(c) Conditions on the ships *Vincent* and *Audace***

155. The Government noted that, in his decision of 1 June 2012 (see paragraphs 24-29 above), the Palermo preliminary investigations judge had found that the measures taken to cope with the presence of migrants on Lampedusa had been compliant with national and international law, and had been adopted with the requisite promptness in a situation of emergency. The judge had also taken the view that the reception conditions on the ships *Audace* and *Vincent* had been satisfactory.

156. The Government lastly challenged the applicants' allegations of ill-treatment by the police, pointing out that they were not based on any evidence such as medical certificates.

**C. Third-party intervention**

157. The Coordination Française pour le droit d'asile, a coalition which submitted written comments on behalf of four associations (Avocats pour la défense des droits des étrangers, Groupe d'information et de soutien des immigré.e.s (GISTI), Ligue des droits de l'homme et du citoyen and the



International Federation for Human Rights (Fédération internationale des ligues des droits de l'Homme – FIDH)), asked the Grand Chamber to “solemnly uphold” the Chamber judgment. It submitted that it was necessary to take into account the vulnerability of the migrants, and particularly those who had endured a sea crossing, in assessing the existence of treatment contrary to Article 3 of the Convention. It acknowledged that the Court had rarely found a violation of that Article in cases of short-term detention, and only in the presence of aggravating circumstances. However, the vulnerability of the migrants, combined with conditions of detention that impaired their human dignity, was sufficient for a finding that the level of severity required by Article 3 had been reached. This had been confirmed by the case-law developed by the Court in the case of *M.S.S. v. Belgium and Greece* ([GC], no. 30696/09, ECHR 2011), by the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and by the observations of the UNHCR. Moreover, conditions of detention were a major factor in the deterioration of the mental health of migrants.

#### **D. The Court’s assessment**

##### *1. Principles established in the Court’s case-law*

158. The Court would reiterate at the outset that the prohibition of inhuman or degrading treatment is a fundamental value in democratic societies (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V; *Labita*, cited above, § 119; *Gäfgen v. Germany* [GC], no. 22978/05, § 87, ECHR 2010; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 195, ECHR 2012; and *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, § 315, ECHR 2014 (extracts)). It is also a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention (see *Bouyid v. Belgium* [GC], no. 23380/09, §§ 81 and 89-90, ECHR 2015). The prohibition in question is absolute, for no derogation from it is permissible even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organised crime, irrespective of the conduct of the person concerned (see, *inter alia*, *Chahal*, cited above, § 79; *Georgia v. Russia (I)* [GC], no. 13255/07, § 192, ECHR 2014 (extracts); *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 113, ECHR 2014 (extracts); and *Bouyid*, cited above, § 81).

##### **(a) Whether the treatment falls within Article 3 of the Convention**

159. Nevertheless, according to the Court’s well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the

scope of Article 3. The assessment of that level is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, cited above, § 162; *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX; *Gäfgen*, cited above, § 88; *El-Masri*, cited above, § 196; *Naumenko v. Ukraine*, no. 42023/98, § 108, 10 February 2004; and *Svinarenko and Slyadnev*, cited above, § 114).

160. In order to determine whether the threshold of severity has been reached, the Court also takes other factors into consideration, in particular:

(a) The purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it (see *Bouyid*, cited above, § 86), although the absence of an intention to humiliate or debase the victim cannot conclusively rule out its characterisation as “degrading” and therefore prohibited by Article 3 (see, among other authorities, *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX; *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III; *Price*, cited above, § 24; and *Svinarenko and Slyadnev*, cited above, § 114).

(b) The context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions (see *Bouyid*, cited above, § 86).

(c) Whether the victim is in a vulnerable situation, which is normally the case for persons deprived of their liberty (see, in respect of police custody, *Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII, and *Bouyid*, cited above, § 83 *in fine*), but there is an inevitable element of suffering and humiliation involved in custodial measures and this as such, in itself, will not entail a violation of Article 3. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Rahimi v. Greece*, no. 8687/08, § 60, 5 April 2011).

**(b) Protection of vulnerable persons and detention of potential immigrants**

161. The Court would emphasise that Article 3 taken in conjunction with Article 1 of the Convention must enable effective protection to be provided, particularly to vulnerable members of society, and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge (see *Z. and Others v. the United Kingdom* [GC],

no. 29392/95, § 73, ECHR 2001-V, and *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 53, ECHR 2006-XI). In this connection, the Court must examine whether or not the impugned regulations and practices, and in particular the manner in which they were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's positive obligations under Article 3 of the Convention (see *Mubilanzila Mayeka et Kaniki Mitunga*, cited above, § 54, and *Rahimi*, cited above, § 62).

162. While States are entitled to detain potential immigrants under their “undeniable ... right to control aliens’ entry into and residence in their territory” (see *Amuur*, cited above, § 41), this right must be exercised in accordance with the provisions of the Convention (see *Mahdid and Haddar v. Austria* (dec.), no. 74762/01, 8 December 2005; *Kanagaratnam and Others v. Belgium*, no. 15297/09, § 80, 13 December 2011; and *Sharifi and Others v. Italy and Greece*, no. 16643/09, § 188, 21 October 2014). The Court must have regard to the particular situation of these persons when reviewing the manner in which the detention order was implemented against the yardstick of the Convention provisions (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 100, 24 January 2008; *M.S.S. v. Belgium and Greece*, cited above, § 217; and *Rahimi*, cited above, § 61).

**(c) Conditions of detention in general and prison overcrowding in particular**

163. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). In particular, the length of the period during which the applicant was detained in the impugned conditions will be a major factor (see *Kalashnikov v. Russia* no. 47095/99, § 102, ECHR 2002-VI; *Kehayov v. Bulgaria*, no. 41035/98, § 64, 18 January 2005; *Alver v. Estonia*, no. 64812/01, § 50, 8 November 2005; and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 142, 10 January 2012).

164. Where overcrowding reaches a certain level, the lack of space in an institution may constitute the key factor to be taken into account in assessing the conformity of a given situation with Article 3 (see, in respect of prisons, *Karalevičius v. Lithuania*, no. 53254/99, § 39, 7 April 2005). Extreme lack of space in prison cells weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were “degrading” within the meaning of Article 3 of the Convention (see *Mursič v. Croatia* [GC], no. 7334/13, § 104, 20 October 2016).

165. Thus, in examining cases of severe overcrowding, the Court has found that this aspect sufficed in itself to entail a violation of Article 3 of the Convention. As a general rule, although the space considered desirable by the CPT for collective cells is 4 sq. m, the personal space available to the

applicants in the relevant cases was less than 3 sq. m (see *Kadikis v. Latvia*, no. 62393/00, § 55, 4 May 2006; *Andrey Frolov v. Russia*, no. 205/02, §§ 47-49, 29 March 2007; *Kantyre v. Russia*, no. 37213/02, §§ 50-51, 21 June 2007; *Sulejmanovic v. Italy*, no. 22635/03, § 43, 16 July 2009; *Ananyev and Others*, cited above, §§ 144-45; and *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, § 68, 8 January 2013).

166. The Court has recently confirmed that the requirement of 3 sq. m of floor surface per detainee (including space occupied by furniture but not counting the in-cell sanitary facility) in multi-occupancy accommodation should be maintained as the relevant minimum standard for its assessment under Article 3 of the Convention (see *Mursič*, cited above, §§ 110 and 114). It also stated that a weighty but not irrebuttable presumption of a violation of Article 3 arose when the personal space available to a detainee fell below 3 sq. m in multi-occupancy accommodation. The presumption could be rebutted in particular by demonstrating that the cumulative effects of the other aspects of the conditions of detention compensated for the scarce allocation of personal space. In that connection the Court takes into account such factors as the length and extent of the restriction, the degree of freedom of movement and the adequacy of out-of-cell activities, as well as whether or not the conditions of detention in the particular facility are generally decent (*ibid.*, §§ 122-38).

167. However, in cases where the overcrowding was not significant enough to raise, in itself, an issue under Article 3, the Court has noted that other aspects of detention conditions had to be taken into account in examining compliance with that provision. Those aspects include the possibility of using toilets with respect for privacy, ventilation, access to natural air and light, quality of heating and compliance with basic hygiene requirements (see also the points set out in the European Prison Rules adopted by the Committee of Ministers, as cited in paragraph 32 of the judgment in *Torreggiani and Others*, cited above). As the Court found in *Mursič* (cited above, § 139), in cases where a prison cell measuring in the range of 3 to 4 sq. m of personal space per inmate is at issue, the space factor remains a weighty consideration in the Court's assessment of the adequacy of the conditions of detention. Thus, in such cases, the Court has found a violation of Article 3 where the lack of space went together with other poor material conditions of detention such as: a lack of ventilation and light (see *Torreggiani and Others*, cited above, § 69; see also *Babushkin v. Russia*, no. 67253/01, § 44, 18 October 2007; *Vlasov v. Russia*, no. 78146/01, § 84, 12 June 2008; and *Moiseyev v. Russia*, no. 62936/00, §§ 124-27, 9 October 2008); limited access to outdoor exercise (see *István Gábor Kovács v. Hungary*, no. 15707/10, § 26, 17 January 2012) or a total lack of privacy in the cell (see *Novoselov v. Russia*, no. 66460/01, §§ 32 and 40-43, 2 June 2005; *Khudoyorov v. Russia*, no. 6847/02, §§ 106-07,

ECHR 2005-X (extracts); and *Belevitskiy v. Russia*, no. 72967/01, §§ 73-79, 1 March 2007).

**(d) Evidence of ill-treatment**

168. Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof “beyond reasonable doubt” and such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact (see *Ireland v. the United Kingdom*, cited above, § 161 *in fine*; *Labita*, cited above, § 121; *Jalloh*, cited above, § 67; *Ramirez Sanchez v. France* [GC], no. 59450/00, § 117, ECHR 2006-IX; *Gäfgen*, cited above, § 92; and *Bouyid*, cited above, § 82).

169. Even if there is no evidence of actual bodily injury or intense physical or mental suffering, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and thus fall within Article 3 (see, among other authorities, *Gäfgen*, cited above, § 89; *Vasyukov v. Russia*, no. 2974/05, § 59, 5 April 2011; *Georgia v. Russia (I)*, cited above, § 192; and *Svinarenko and Slyadnev*, cited above, § 114). It may well suffice for the victim to be humiliated in his own eyes, even if not in the eyes of others (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26; *M.S.S. v. Belgium and Greece*, cited above, § 220; and *Bouyid*, cited above, § 87).

*2. Application of the above-mentioned principles in cases comparable to that of the applicants*

170. The Court has already had occasion to apply the above-mentioned principles to cases that are comparable to that of the applicants, concerning in particular the conditions in which would-be immigrants and asylum-seekers were held in reception or detention centres. Two of those cases have been examined by the Grand Chamber.

171. In its judgment in *M.S.S. v. Belgium and Greece* (cited above, §§ 223-34), the Grand Chamber examined the detention of an Afghan asylum-seeker at Athens international airport for four days in June 2009 and for one week in August 2009. It found that there had been a violation of Article 3 of the Convention, referring to cases of ill-treatment by police officers reported by the CPT and to the conditions of detention as described by a number of international organisations and regarded as “unacceptable”. In particular, the detainees had been obliged to drink water from the toilets; there were 145 detainees in a 110 sq. m space; there was only one bed for fourteen to seventeen people; there was a lack of sufficient ventilation and the cells were unbearably hot; detainees’ access to the toilets was severely

restricted and they had to urinate in plastic bottles; there was no soap or toilet paper in any sector; sanitary facilities were dirty and had no doors; and detainees were deprived of outdoor exercise.

172. The case of *Tarakhel v. Switzerland* ([GC], no. 29217/12, §§ 93-122, ECHR 2014) concerned eight Afghan migrants who alleged that in the event of their removal to Italy they would have been victims of inhuman or degrading treatment relating to the existence of “systemic deficiencies” in the reception facilities for asylum-seekers in that country. The Grand Chamber examined the general reception system for asylum-seekers in Italy and noted deficiencies in terms of the insufficient size of reception centres and the poor living conditions in the facilities available. In particular, there were long waiting lists for access to the centres, and the capacity of the facilities did not seem capable of absorbing the greater part of the demand for accommodation. While taking the view that the situation in Italy could “in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment” and that it did not in itself act as a bar to all removals of asylum-seekers to that country, the Court nevertheless took the view that “the possibility that a significant number of asylum seekers [might] be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, [could] not be dismissed as unfounded”. Having regard to the fact that the applicants were two adults accompanied by their six minor children, the Court found that “were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention”.

173. The conditions of detention of migrants or travellers have also given rise to a number of Chamber judgments.

In *S.D. v. Greece* (no. 53541/07, §§ 49-54, 11 June 2009) the Court found that to confine an asylum-seeker for two months in a prefabricated unit, without any possibility of going outside or using the telephone, and without having clean sheets or sufficient toiletries, constituted degrading treatment for the purposes of Article 3 of the Convention. Similarly, a detention period of six days, in a confined space, without any possibility of exercise or any leisure area, and where the detainees slept on dirty mattresses and had no free access to toilets, was unacceptable under Article 3.

174. *Tabesh v. Greece* (no. 8256/07, §§ 38-44, 26 November 2009) concerned the detention of an asylum-seeker for three months, pending the application of an administrative measure, on police premises without any possibility of leisure activity or appropriate meals. The Court held that this constituted degrading treatment. It reached a similar conclusion in *A.A. v. Greece* (no. 12186/08, §§ 57-65, 22 July 2010), which concerned the

three-month detention of an asylum-seeker in an overcrowded facility where the cleanliness and conditions of hygiene were atrocious, where no facility was available for leisure or meals, where the poor state of repair of the bathrooms made them virtually unusable and where the detainees had to sleep in dirty and cramped conditions (see, to the same effect, *C.D. and Others v. Greece*, nos. 33441/10, 33468/10 and 33476/10, §§ 49-54, 19 December 2013, concerning the detention of twelve migrants for periods of between forty-five days and two months and twenty-five days; *F.H. v. Greece*, no. 78456/11, §§ 98-103, 31 July 2014, concerning the detention pending removal of an Iranian migrant in four detention centres for a total duration of six months; and *Ha.A. v. Greece*, no. 58387/11, §§ 26-31, 21 April 2016, where the Court noted that reliable sources had reported on the severe lack of space, 100 detainees having been “cramped” into an area of 35 sq. m.; see also *Efremidze v. Greece*, no. 33225/08, §§ 36-42, 21 June 2011; *R.U. v. Greece*, no. 2237/08, §§ 62-64, 7 June 2011; *A.F. v. Greece*, no. 53709/11, §§ 71-80, 13 June 2013; and *B.M. v. Greece*, no. 53608/11, §§ 67-70, 19 December 2013).

175. The case of *Rahimi* (cited above, §§ 63-86) concerned the detention pending deportation of an Afghan migrant, who at the time was 15 years old, in a centre for illegal immigrants at Pagani, on the island of Lesbos. The Court found a violation of Article 3 of the Convention, observing as follows: that the applicant was an unaccompanied minor; that his allegations about serious problems of overcrowding (number of detainees four times higher than capacity), poor hygiene and lack of contact with the outside world had been corroborated by the reports of the Greek Ombudsman, the CPT and a number of international organisations; that even though the applicant had only been detained for a very limited period of two days, on account of his age and personal situation he was extremely vulnerable; and that the detention conditions were so severe that they undermined the very essence of human dignity.

176. It should also be pointed out that in the case of *T. and A. v. Turkey* (cited above, §§ 91-99) the Court found that the detention of a British national at Istanbul airport for three days was incompatible with Article 3 of the Convention. The Court observed that the first applicant had been confined in personal space of at most 2.3 sq. m and as little as 1.23 sq. m, and that there was only one sofa-bed on which the inmates took turns to sleep.

177. The Court, however, found no violation of Article 3 of the Convention in *Aarabi v. Greece* (no. 39766/09, §§ 42-51, 2 April 2015), concerning the detention pending removal of a Lebanese migrant aged 17 and ten months at the relevant time, which had taken place: from 11 to 13 July 2009 on coastguard premises on the island of Chios; from 14 to 26 July 2009 at the Mersinidi detention centre; from 27 to 30 July 2009 at the Tycherio detention centre; and on 30 and 31 July 2009 on police

premises in Thessaloniki. The Court noted in particular that the Greek authorities could not reasonably have known that the applicant was a minor at the time of his arrest and therefore his complaints had necessarily been examined as if they had been raised by an adult; that the periods of detention in the Tycherio centre and on the coastguard and police premises had lasted only two or three days, and that no other aggravating factor had been put forward by the applicant (there were no CPT findings about the Tycherio detention centre); that the applicant had spent thirteen days in the Mersinidi detention centre, in respect of which there were no reports from national or international bodies for the relevant period; that this centre had been mentioned in an Amnesty International report covering a subsequent period, referring to a lack of toiletries and the fact that some inmates slept on mattresses placed on the bare floor, without however reporting any general hygiene problems; that even though the Government had acknowledged that Mersinidi had exceeded its accommodation capacity, there was no evidence that the applicant had had less than 3 sq. m of personal space in his cell; that on 26 July 2009 the authorities had decided to transfer a certain number of individuals, including the applicant, to another detention centre, thus showing that they had sought in a timely manner to improve the detention conditions endured by the applicant; and that following his visit to Greece in October 2010, the UN Special Rapporteur on torture and other cruel, inhuman or degrading punishment or treatment had described the detention conditions in Mersinidi as adequate.

### *3. Application of those principles in the present case*

#### **(a) The existence of a humanitarian emergency and its consequences**

178. The Court finds it necessary to begin by addressing the Government's argument that it should take due account of the context of humanitarian emergency in which the events in question had taken place (see paragraph 151 above).

179. In this connection the Court, like the Chamber, cannot but take note of the major migration crisis that unfolded in 2011 following events related to the "Arab Spring". As the PACE Ad Hoc Sub-Committee noted on 30 September 2011 (see, in particular, §§ 9-13 of its report, cited in paragraph 49 above), following uprisings in Tunisia and Libya there was a fresh wave of arrivals by boat, as a result of which Italy declared a state of humanitarian emergency on the island of Lampedusa and appealed for solidarity from the member States of the European Union. By 21 September 2011, when the applicants were on the island, 55,298 persons had arrived there by sea. As indicated by the Government (see paragraph 150 above), between 12 February and 31 December 2011, 51,573 nationals of third States (of whom about 46,000 were men and 26,000 were Tunisian nationals) landed on the islands of Lampedusa and Linosa. The arrival *en*



*masse* of North African migrants undoubtedly created organisational, logistical and structural difficulties for the Italian authorities in view of the combination of requirements to be met, as they had to rescue certain vessels at sea, to receive and accommodate individuals arriving on Italian soil, and to take care of those in particularly vulnerable situations. The Court would observe in this connection that according to the data supplied by the Government (*ibid.*) and not disputed by the applicants, there were some 3,000 women and 3,000 children among the migrants who arrived during the period in question.

180. In view of the significant number of factors, whether political, economic or social, which gave rise to such a major migration crisis and taking account of the challenges facing the Italian authorities, the Court cannot agree with the applicants' view (see paragraph 140 above) that the situation in 2011 was not exceptional. An excessive burden might be imposed on the national authorities if they were required to interpret those numerous factors precisely and to foresee the scale and timeframe of an influx of migrants. In that connection it should be observed that the significant increase of arrivals by sea in 2011 compared to previous years was confirmed by the report of the PACE Ad Hoc Sub-Committee. According to that report, 15,527, 18,047, 11,749 and 31,252 migrants had arrived on Lampedusa in 2005, 2006, 2007 and 2008 respectively. The number of arrivals had diminished in 2009 and 2010, with, respectively, 2,947 and 459 individuals (see, in particular, §§ 9 and 10 of the report, cited in paragraph 49 above). That reduction had been significant enough for the authorities to close the reception centres on Lampedusa (see, in particular, *ibid.*, §§ 10 and 51). When those data are compared with the figures for the period from 12 February to 31 December 2011 (see paragraphs 150 and 179 above), which saw 51,573 nationals from third countries arriving on Lampedusa and Linosa, it can be appreciated that the year 2011 was marked by a very significant increase in the number of migrants arriving by sea from North African countries on the Italian islands to the south of Sicily.

181. Neither can the Court criticise, in itself, the decision to concentrate the initial reception of the migrants on Lampedusa. As a result of its geographical situation, that was where most rudimentary vessels would arrive and it was often necessary to carry out rescues at sea around the island in order to protect the life and health of the migrants. It was therefore not unreasonable, at the initial stage, to transfer the survivors from the Mediterranean crossing to the closest reception facility, namely the CSPA at Contrada Imbriacola.

182. Admittedly, as noted by the Chamber, the accommodation capacity available in Lampedusa was both insufficient to receive such a large number of new arrivals and ill-suited to stays of several days. It is also true that in addition to that general situation there were some specific problems just after the applicants' arrival. On 20 September a revolt broke out among the

migrants being held at the Contrada Imbriacola CSPA and the premises were gutted by an arson attack (see paragraphs 14 and 26 above). On the next day, about 1,800 migrants started protest marches through the island's streets (see paragraph 14 above) and clashes occurred in the port of Lampedusa between the local community and a group of aliens threatening to explode gas canisters. Acts of self-harm and vandalism were also perpetrated (see paragraphs 26 and 28 above). Those incidents contributed to exacerbating the existing difficulties and creating a climate of heightened tension.

183. The foregoing details show that the State was confronted with many problems as a result of the arrival of exceptionally high numbers of migrants and that during this period the Italian authorities were burdened with a large variety of tasks, as they had to ensure the welfare of both the migrants and the local people and to maintain law and order.

184. That being said, the Court can only reiterate its well-established case-law to the effect that, having regard to the absolute character of Article 3, an increasing influx of migrants cannot absolve a State of its obligations under that provision (see *M.S.S. v. Belgium and Greece*, cited above, § 223; see also *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, §§ 122 and 176, ECHR 2012), which requires that persons deprived of their liberty must be guaranteed conditions that are compatible with respect for their human dignity. In this connection the Court would also point out that in accordance with its case-law as cited in paragraph 160 above, even treatment which is inflicted without the intention of humiliating or degrading the victim, and which stems, for example, from objective difficulties related to a migrant crisis, may entail a violation of Article 3 of the Convention.

185. While the constraints inherent in such a crisis cannot, in themselves, be used to justify a breach of Article 3, the Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose. In its assessment, the Court will thus bear in mind, together with other factors, that the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time.

186. Like the Chamber, the Court is of the view that, under Article 3 of the Convention, it is appropriate to examine separately the two situations at issue, namely the reception conditions in the Contrada Imbriacola CSPA, on the one hand, and those on the ships *Vincent* and *Audace*, on the other.

**(b) Conditions in the Contrada Imbriacola CSPA**

187. The Court would begin by observing that it is called upon to determine whether the conditions of the applicants' detention in the Lampedusa CSPA can be regarded as "inhuman or degrading treatment"

within the meaning of Article 3 of the Convention. For that purpose a number of factors must be taken into consideration.

188. First, at the time of the applicants' arrival, the conditions in the CSPA were far from ideal. The applicants' allegations about the general state of the centre, and in particular the problems of overcrowding, poor hygiene and lack of contact with the outside world, are confirmed by the reports of the Senate's Special Commission and Amnesty International (see paragraphs 35 and 50 above). The Special Commission, an institution of the respondent State itself, reported that rooms accommodating up to twenty-five persons contained four-tier bunk beds placed side by side, that foam-rubber mattresses, many of them torn, were placed along corridors and outside landings, and that in many rooms there were no light bulbs. In toilets and showers privacy was ensured only by cloth or plastic curtains placed in an improvised manner, water pipes were sometimes blocked or leaking, the smell from the toilets pervaded the whole area, and rainwater carried dampness and dirt into the living quarters. Amnesty International also reported on severe overcrowding, a general lack of hygiene and toilets which were smelly and unusable.

189. The Chamber rightly emphasised these problems. It cannot, however, be overlooked that the Senate's Special Commission visited the Contrada Imbriacola CSPA on 11 February 2009 (see paragraph 35 above), about two years and seven months before the applicants' arrival. The Court does not find it established, therefore, that the conditions described by the Special Commission still obtained in September 2011 at the time of the applicants' arrival.

190. Information from a later date is available in a report by the PACE Ad Hoc Sub-Committee, which carried out a fact-finding mission on Lampedusa on 23 and 24 May 2011, less than four months before the applicants' arrival (see paragraph 49 above). It is true that the Ad Hoc Sub-Committee expressed its concerns about the conditions of hygiene as a result of overcrowding in the CSPA, observing that the facility was ill-suited to stays of several days (see, in particular, §§ 30 and 48 of the report). That report nevertheless indicates the following points in particular (*ibid.*, §§ 28, 29, 32 and 47):

(a) The associations participating in the "Praesidium Project" (UNHCR, the IOM, the Red Cross and Save the Children) were authorised to maintain a permanent presence inside the reception centre, making interpreters and cultural mediators available.

(b) All those participants were working together on good terms, endeavouring to coordinate their efforts, with the shared priority of saving lives in sea rescue operations, doing everything possible to receive new arrivals in decent conditions and then assisting in rapidly transferring them to centres elsewhere in Italy.

(c) Reception conditions were decent although very basic (while rooms were full of mattresses placed side by side directly on the ground, the buildings – prefabricated units – were well ventilated because the rooms had windows; and the sanitary facilities appeared sufficient when the centre was operating at its normal capacity).

(d) Anyone wishing to be examined by a doctor could be, and no request to that effect was refused.

(e) A regular inspection of the sanitary facilities and food at the centres was carried out by the Head of the Palermo Health Unit.

191. In the light of that information the Court takes the view that the conditions in the Lampedusa CSPA cannot be compared to those which, in the judgments cited in paragraphs 171 and 173-75 above, justified finding a violation of Article 3 of the Convention.

192. As to the alleged overcrowding in the CSPA, the Court observes that, according to the applicants, the maximum capacity in the Contrada Imbriacola facility was 804 (see paragraph 142 above), whereas the Government submitted that it could accommodate up to about 1,000 (see paragraph 153 above). The applicants added that on 16, 17, 18, 19 and 20 September, the centre housed 1,357, 1,325, 1,399, 1,265 and 1,017 migrants respectively. Those figures do not quite correspond to the indications provided by the Government, which at the hearing before the Court stated that at the time of the applicants' stay there had been 917 migrants in the Contrada Imbriacola CSPA.

193. In those circumstances, the Court is not in a position to determine the precise number of persons being held there at the material time (see, *mutatis mutandis*, *Sharifi and Others*, cited above, § 189). It would merely observe that if the applicants are correct in their indication of the number of persons held and the capacity of the CSPA, the centre must have exceeded its limit (804 persons) by a percentage of between 15% and 75%. This means that the applicants must clearly have had to cope with the problems resulting from a degree of overcrowding. However, their situation cannot be compared to that of individuals detained in a prison, a cell or a confined space (see, in particular, the case-law cited in paragraphs 163-67, 173 and 176 above). The applicants did not dispute the Government's assertions that the migrants held in the Contrada Imbriacola CSPA could move around freely within the confines of the facility, communicate by telephone with the outside world, make purchases and contact representatives of humanitarian organisations and lawyers (see paragraph 153 above). Even though the number of square metres per person in the centre's rooms has not been established, the Court finds that the freedom of movement enjoyed by the applicants in the CSPA must have alleviated in part, or even to a significant extent, the constraints caused by the fact that the centre's maximum capacity was exceeded.

194. As the Chamber rightly pointed out, when they were held at the Lampedusa CSPA, the applicants were weakened physically and psychologically because they had just made a dangerous crossing of the Mediterranean. Nevertheless, the applicants, who were not asylum-seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured traumatic experiences in their country of origin (contrast *M.S.S. v. Belgium and Greece*, cited above, § 232). In addition, they belonged neither to the category of elderly persons nor to that of minors (on the subject of which, see, among other authorities, *Popov v. France*, nos. 39472/07 and 39474/07, §§ 90-103, 19 January 2012). At the time of the events they were aged between 23 and 28 and did not claim to be suffering from any particular medical condition. Nor did they complain of any lack of medical care in the centre.

195. The Court further notes that the applicants were placed in the Contrada Imbriacola CSPA on 17 and 18 September 2011 respectively (see paragraphs 11 and 12 above), and that they were held there until 20 September, when, following a fire, they were transferred to a sports complex on Lampedusa (see paragraph 14 above). Their stay in that facility thus lasted three and four days respectively. As the Chamber pointed out, the applicants thus stayed in the CSPA for only a short period. Their limited contact with the outside world could not therefore have had serious consequences for their personal situations (see, *mutatis mutandis*, *Rahimi*, cited above, § 84).

196. In certain cases the Court has found violations of Article 3 in spite of the short duration of the deprivation of liberty in question (see, in particular, the three judgments cited by the applicants as referred to in paragraph 143 above). However, the present case can be distinguished in various respects from those judgments. In particular, in the *Brega* judgment (cited above, §§ 39-43), a forty-eight-hour period of detention had been combined with wrongful arrest, a renal colic attack subsequently suffered by the applicant, a delay in medical assistance, a lack of bedding, and a low temperature in the cell. In the case of *T. and A. v. Turkey* (cited above, §§ 91-99), the personal space available to the first applicant for the three days of her detention had been limited (between 2.3 and 1.23 sq. m) and there had been only one sofa-bed on which the inmates took turns to sleep. Lastly, the *Gavrilovici* judgment (cited above, §§ 41-44) concerned a longer period of detention than that endured by the present applicants (five days), with the aggravating factors that the four inmates were obliged to sleep on a wooden platform about 1.8 m wide, that there was no heating or toilet in the cell and that the cells in the Ștefan-Vodă police station had subsequently been closed because they were held to be incompatible with any form of detention. The Court also has regard to the cases of *Koktysh v. Ukraine* (no. 43707/07, §§ 22 and 91-95, 10 December 2009), concerning detention periods of ten and four days in a very overcrowded cell, where prisoners had

to take it in turns to sleep, in a prison where the conditions had been described as “atrocious”, and *Cășuneanu v. Romania* (no. 22018/10, §§ 60-62, 16 April 2013), concerning a five-day period of detention in circumstances of overcrowding, poor hygiene, dirtiness, and a lack of privacy and outdoor exercise.

197. That being said, the Court cannot overlook the fact, pointed out both by the PACE Ad Hoc Sub-Committee and by Amnesty International (see paragraphs 49-50 above), that the Lampedusa CSPA was not suited to stays of more than a few days. As that facility was designed more as a transit centre than a detention centre, the authorities were under an obligation to take steps to find other satisfactory reception facilities with enough space and to transfer a sufficient number of migrants to those facilities. However, in the present case the Court cannot address the question whether that obligation was fulfilled, because only two days after the arrival of the last two applicants, on 20 September 2011, a violent revolt broke out among the migrants and the Lampedusa CSPA was gutted by fire (see paragraph 14 above). It cannot be presumed that the Italian authorities remained inactive and negligent, nor can it be maintained that the transfer of the migrants should have been organised and carried out in less than two or three days. In this connection it is noteworthy that in the *Aarabi* case (cited above, § 50) the Court found that the decision of the domestic authorities to transfer a certain number of individuals, including the applicant, to another detention centre had demonstrated their willingness to improve the applicant’s conditions of detention in a timely manner. The relevant decision in *Aarabi*, however, had been taken thirteen days after the applicant’s placement in the Mersinidi centre.

198. The Court further observes that the applicants did not claim that they had been deliberately ill-treated by the authorities in the centre, that the food or water had been insufficient or that the climate at the time had affected them negatively when they had had to sleep outside.

199. Having regard to all the factors set out above, taken as a whole, and in the light of the specific circumstances of the applicants’ case, the Court finds that the treatment they complained of does not exceed the level of severity required for it to fall within Article 3 of the Convention.

200. It follows, in the present case, that the conditions in which the applicants were held at the Contrada Imbriacola CSPA did not constitute inhuman or degrading treatment and that there has therefore been no violation of Article 3 of the Convention.

201. Finally, the Court has also taken note of the Government’s statements (see paragraph 149 above) that significant amounts have been invested in order to set up new reception facilities, and that during his visit on 23 and 24 June 2013 the UNHCR representative for Southern Europe noted with satisfaction the steps taken by the national and local authorities

in order to improve the general situation on the island of Lampedusa (see, *mutatis mutandis*, *Aarabi*, § 50 *in fine*).

(c) **The conditions on the ships *Vincent* and *Audace***

202. As regards the conditions on the two ships, the Court notes that the first applicant was placed on the *Vincent*, with some 190 others, while the second and third applicants were transferred to the *Audace*, which held about 150 persons (see paragraph 15 above). Their confinement on the ships began on 22 September 2011 and ended on 29 or 27 September 2011, depending on the applicant; it thus lasted about seven days for the first applicant and about five days for the second and third applicants (see paragraph 17 above).

203. The Court has examined the applicants' allegations that, on board the ships, they were grouped together in an overcrowded lounge area, that they could only go outside onto small decks for a few minutes every day, and that they had to sleep on the floor and wait several hours to use the toilets; also that they were not allowed access to the cabins, that food was distributed by being thrown on the floor, that they were occasionally insulted and ill-treated by the police and that they did not receive any information from the authorities (see paragraphs 16, 145 and 146 above).

204. The Court notes that those allegations are not based on any objective reports, merely their own testimony. The applicants argued that the absence of any corroborating material could be explained by the nature of the ships, which they described as isolated and inaccessible places, and that in those circumstances it was for the Government to provide evidence that the requirements of Article 3 had been met (see paragraph 147 above).

205. On the latter point, the Court has held that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see *Gäfgen*, cited above, § 92; compare also *Tomasi v. France*, 27 August 1992, § 110, Series A no. 241-A; *Ribitsch v. Austria*, 4 December 1995, § 34, Series A no. 336; *Aksoy v. Turkey*, 18 December 1996, § 61, *Reports* 1996-VI; and *Selmouni*, cited above, § 87). In addition, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim (see *Salman*, cited above, § 100; *Rivas v. France*, no. 59584/00, § 38, 1 April 2004; *Turan Çakır v. Belgium*, no. 44256/06, § 54, 10 March 2009; and *Mete and Others v. Turkey*, no. 294/08, § 112, 4 October 2012). In the absence of any such explanation, the Court can draw inferences which may

be unfavourable for the Government (see, among other authorities, *El-Masri*, cited above, § 152). This is justified by the fact that persons in the hands of the police or a comparable authority are in a vulnerable position and the authorities are under a duty to protect them (see, *Bouyid*, cited above, §§ 83-84; see also, in respect of persons in police custody, *Salman*, cited above, § 99).

206. In the light of that case-law, the burden of proof in this area may be reversed where allegations of ill-treatment at the hands of the police or other similar agents of the State are arguable and based on corroborating factors, such as the existence of injuries of unknown and unexplained origin. The Court observes, however, that such factors are totally absent in the present case, as the applicants have failed to produce any documents certifying any signs or after-effects of the alleged ill-treatment or any third-party testimony confirming their version of the facts.

207. In any event, the Court cannot but attach decisive weight to the fact that the Government adduced before it a judicial decision contradicting the applicants' account, namely that of the Palermo preliminary investigations judge dated 1 June 2012. That decision indicates (see paragraph 27 above) that the migrants were provided with medical assistance, hot water, electricity, meals and hot drinks. In addition, according to a press agency note dated 25 September 2011 and cited in the decision, a member of parliament, T.R., accompanied by the deputy chief of police and by police officers, boarded the vessels in Palermo harbour and spoke to some of the migrants. The MP reported that the migrants were in good health, that they had assistance and that they were sleeping in cabins with bedding or on reclining seats. They had access to prayer rooms, the Civil Protection Authority had made clothing available to them and the food was satisfactory (pasta, chicken, vegetables, fruit and water).

208. The Court takes the view that there is no reason for it to question the impartiality of an independent judge such as the Palermo preliminary investigations judge. To the extent that the applicants criticised the judge's decision on the ground that it was based on the statements of an MP to the press and not reiterated at the hearing, and that the police had been present during the MP's visit (see paragraph 147 above), the Court reiterates that where allegations are made under Article 3 of the Convention it is prepared to conduct a thorough examination of the findings of the national courts, and that in doing so it may take account of the quality of the domestic proceedings and any possible flaws in the decision-making process (see *Denisenko and Bogdanchikov v. Russia*, no. 3811/02, § 83, 12 February 2009, and *Bouyid*, cited above, § 85). Nevertheless, sound evidence alone, not mere hypothetical speculation, is necessary to call into question the assessment of the facts by an independent domestic court. The applicants have not, however, produced any evidence capable of showing that the press inaccurately reported the MP's statements. In addition, the police presence



in the detention centre cannot be regarded as unusual and cannot, in itself, give rise to objectively justified doubts as to the reliability of the results of a visit to or inspection of such a facility. The Court would indicate its agreement with the Chamber's findings that the fact that the MP was accompanied by the deputy chief of police and police officers did not in itself mean that the MP's independence or the veracity of his account had to be called into question.

209. As to the applicants' allegations about the appeal made to the Italian Government by Médecins sans Frontières on 28 September 2011 (see paragraph 147 above), the Court notes that on that date the return of the migrants who had been held on the ships was already in progress. The second and third applicants had already boarded planes for Tunis, while the first applicant was to do so the following day (29 September 2011 – see paragraph 17 above). Even if the Government had responded to the appeal from Médecins sans Frontières as soon as possible, the inspection would have taken place when the ships were already being vacated. It could not therefore have realistically provided any useful evidence by which to assess the conditions of accommodation and, in particular, the existence of a serious overcrowding problem as described by the applicants.

210. Having regard to the foregoing, it cannot be established that the accommodation conditions on the ships reached the minimum level of severity required for treatment to fall within Article 3 of the Convention. The applicants' allegations as to the lack of relevant information or explanations from the authorities and the point that their confinement on the ships followed on from their negative experience in the Contrada Imbriacola CSPA (see paragraph 146 above) cannot alter that finding.

211. It follows that the conditions in which the applicants were held on the ships *Vincent* and *Audace* did not constitute inhuman or degrading treatment. There has accordingly been no violation of Article 3 of the Convention under this head.

## VI. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

212. The applicants submitted that they had been victims of collective expulsion.

They relied on Article 4 of Protocol No. 4, which reads as follows:

“Collective expulsion of aliens is prohibited.”

### A. Chamber judgment

213. The Chamber noted that the applicants had been issued with individual refusal-of-entry orders, but that those orders nevertheless

contained identical wording and the only differences were to be found in their personal data. Even though the applicants had undergone an identity check, this was not sufficient in itself to rule out the existence of a collective expulsion within the meaning of Article 4 of Protocol No. 4. In addition, the refusal-of-entry orders did not contain any reference to the personal situations of the applicants and the Government had failed to produce any document capable of proving that individual interviews concerning the specific situation of each applicant had taken place. The Chamber also took account of the fact that a large number of individuals of the same origin, around the time of the events at issue, had been subjected to the same outcome as the applicants. It observed that the agreement between Italy and Tunisia of April 2011, which had not been made public, provided for the return of unlawful migrants from Tunisia through simplified procedures, on the basis of the mere identification by the Tunisian consular authorities of the person concerned. Those elements sufficed for the Chamber to find that the applicants' expulsion had been collective in nature and that Article 4 of Protocol No. 4 had therefore been breached (see paragraphs 153-58 of the Chamber judgment).

## **B. The parties' submissions**

### *1. The applicants*

214. The applicants complained that they had been expelled collectively solely on the basis of their identification and without any consideration of their individual situations. They observed that immediately after their arrival on Lampedusa, the Italian border authorities had registered their identity and taken their fingerprints. They had subsequently had no oral contact with the authorities in question about their situation; in particular, they had not been interviewed and had not been able to receive assistance from a lawyer or from independent qualified staff until they had boarded the planes to be returned to Tunis. At that point they had been asked to give their identity for the second time and the Tunisian Consul was then present. In those circumstances, the applicants had difficulty understanding at what point in time the Italian authorities could have gathered the information required for a careful assessment of their individual situations. The refusal-of-entry orders did not, moreover, contain any indication of such an assessment; they were standardised documents indicating only their date of birth and nationality and containing a set phrase to the effect that "none of the situations [provided for in] Article 10 § 4 of Legislative Decree no. 286 of 1998 [was] present" (see paragraph 19 above). A number of other Tunisian nationals had suffered the same fate, on the basis of a practice whereby the mere verification of Tunisian nationality sufficed for a simplified

“readmission” procedure to be triggered. The ministerial note of 6 April 2011 (see paragraph 37 above) had announced such operations.

215. The applicants alleged that the application of Article 4 of Protocol No. 4 to the migrant crisis, which was currently at the forefront of European political debate, could not be refused on the sole ground that this phenomenon was different from other tragedies of history. In their view, to find otherwise would be tantamount to depriving the most vulnerable persons of protection in the current historic period.

216. As regards the agreement between Italy and Tunisia that had been relied on by the Government (see paragraph 223 below), the applicants were of the view that it did not comply with the safeguards provided for by Article 4 of Protocol No. 4 and had been used to give an appearance of legality to a practice that was in breach of the Convention. Moreover, a violation of Convention rights could not be ruled out on the sole ground that the State’s conduct was compliant with other international commitments. The applicants pointed out that in the case of *Sharifi and Others* (cited above, § 223), the Court had observed that no form of collective and indiscriminate removal could be justified by reference to the Dublin system. This applied all the more so to the bilateral agreement with Tunisia, which according to the applicants had only been disclosed by the Government at the time of their request for referral to the Grand Chamber (see paragraph 40 above).

217. The applicants observed that they had entered Italian territory and had remained there, deprived of their liberty, for a significant period of time. In international law, therefore, their removal had to be classified as an “expulsion” and not as “non-admission”. The concept of “expulsion” applied not only to aliens who had entered the country legally but extended to those who had crossed the national border illegally, as had in fact been acknowledged by the respondent Government themselves in the case of *Hirsi Jamaa and Others* (cited above, § 160).

218. The applicants further pointed out that under Italian law, when foreign nationals without the relevant documentation were allowed to enter the territory of the State in order to be given assistance, their removal could take two different legal forms, either “deferred refusal of entry”, ordered by the Chief of Police (*questore*), or “deportation” (*espulsione*), decided by the Prefect and followed by an implementing order of the Chief of Police, confirmed by the Justice of the Peace. If, as argued by the Government (see paragraph 226 below), the formal classification in domestic law were decisive for the application of Article 4 of Protocol No. 4, this would entail the unacceptable conclusion that the national authorities were free to decide on the safeguards enshrined in that provision and to deprive aliens of such protection through the use of “deferred refusal of entry”, a fast-track mechanism offering very few safeguards.

219. In response to the Government's submission that Tunisia was a "safe country", the applicants argued that Article 4 of Protocol No. 4 concerned the method of expulsion of a group of individuals and not the consequences that they might suffer in the destination country. It was thus a procedural safeguard providing "protection by anticipation" for the purposes of Article 3 of the Convention, which prohibited removal to a country where the individual might be subjected to proscribed treatment.

220. The applicants submitted that the key issue in the present case was whether an individual interview was necessary prior to their expulsion. They observed in this connection that only two aspects distinguished their case from *Hirsi Jamaa and Others* (cited above), namely the fact that they had actually been identified and that they had received identical "deferred refusal-of-entry" orders. Even though the similarity between the orders did not, in itself, lead to the conclusion that there had been a collective expulsion, it was an indication to that effect. In addition, in *Sharifi and Others* (cited above) the Court had found a violation of Article 4 of Protocol No. 4 in respect of one of the applicants who had been expelled (Mr Reza Karimi) even though he had been identified, because there was no evidence that, at the time of the identity check, an interpreter or independent legal adviser had been present, those being indications of an individual interview. Where there was evidence of such an interview, however, the Court had excluded any violation of that provision in the cases of *M.A. v. Cyprus* (no. 41872/10, ECHR 2013); *Sultani v. France* (no. 45223/05, ECHR 2007-IV); and *Andric v. Sweden* ((dec.) no. 45917/99, 23 February 1999). In the applicants' view, to exclude the need for an individual interview would render meaningless the procedural safeguard of Article 4 of Protocol No. 4, because an expulsion could be justified purely on the basis that the alien's nationality – that is, the fact of belonging to a group – had been established.

221. The applicants argued that their interpretation of Article 4 of Protocol No. 4 was confirmed by customary international law, by the case-law of the Court of Justice of the European Union (CJEU) – to the effect that aliens had the right to express their view on the legality of their stay (they referred, in particular, to the *Khaled Boudjlida* and *Sophie Mukarubega* judgments cited above in paragraphs 42-45) – and by a 2016 report of the Italian Senate's Special Commission. The Special Commission had criticised a common practice at the Lampedusa CSPA whereby, only a few hours after being rescued at sea, the migrants had been asked to fill in a form offering them the following options to explain why they had come to Italy: for work, family reunification, to escape poverty, to seek asylum or for other reasons. The applicants explained that those who ticked the box "work" would be earmarked for removal on the basis of a "deferred refusal-of-entry". The Special Commission had recommended in particular that a

real interview be conducted, to determine whether the alien needed protection, in the presence of UNHCR workers.

222. At the hearing before the Court, the applicants' representatives observed that the Government's allegation that "information sheets" had been filled in for each migrant (see paragraph 224 below) had not been supported by any evidence and could not therefore be upheld. According to those representatives, it would have been pointless for their clients to indicate any reasons they might have wished to put forward in opposition to their return. The representatives also pointed out, however, that the applicants' individual circumstances did not enable them to rely on international protection or the *non-refoulement* principle; they were not claiming that they had a right of abode in Italy or that their return had exposed them to a risk of being subjected to inhuman or degrading treatment in Tunisia.

## 2. *The Government*

223. The Government alleged that no collective expulsion had taken place. They observed that the applicants had been returned according to the fast-track procedure provided for in the agreement with Tunisia (see paragraphs 36-40 above), which could be regarded as a "readmission" agreement within the meaning of the Return Directive (see paragraph 41 above). They argued that this agreement had contributed to the repression of migrant smuggling, as called for by the United Nations Convention on Transnational Organized Crime. Moreover, Tunisia was a safe country which respected human rights, this being shown by the fact that the applicants had not reported experiencing persecution or violations of their fundamental rights after their return.

224. In the Government's submission, upon their arrival on Lampedusa all the irregular migrants had been identified by the police in individual interviews with each one, assisted by an interpreter or a cultural mediator. At the hearing before the Court, the Government further stated that "information sheets" containing personal data and any circumstances specific to each migrant had been filled in after the interviews. The forms concerning the applicants had been destroyed, however, during the fire at the Contrada Imbriacola CSPA (see paragraph 14 above). Moreover, photographs had been taken and the migrants' fingerprints recorded.

225. In the Government's view, the applicants, like all the other migrants, had definitely been informed of the possibility of lodging an asylum application, but they had simply decided not to make use of that avenue. At the time of the fire, seventy-two other migrants on Lampedusa had in fact expressed their wish to apply for asylum and on 22 September 2011 they had been transferred to the reception centres of Trapani, Caltanissetta and Foggia in order to establish their status.

226. The Government observed that the Chamber had referred to “*refoulement*” (refusal of entry) and to “*expulsion*” (deportation), without pointing out the distinction between the two notions, which in reality corresponded to different procedures in domestic legislation, more specifically under Legislative Decree no. 286 of 1998 (see paragraph 33 above). In particular, “refusal of entry at the border” was a decision by the border guards to turn away aliens arriving at border crossings without papers and without meeting the requirements for admission to Italy. The “deferred refusal-of-entry” procedure, ordered by the Chief of Police (*questore*), applied where an alien had entered the country illegally and had been allowed to stay temporarily to receive protection. Lastly, “deportation” corresponded to a written and reasoned decision whereby the competent administrative or judicial authorities ordered the removal from the country of an alien who did not have, or no longer had, leave to remain in the country. The Italian legal system made no provision for collective expulsion and Article 19 of Legislative Decree no. 286 of 1998 prohibited the return of an alien to a State where he or she might be subjected to persecution. The Government explained that in the present case the applicants had been issued with “refusal-of-entry and removal” orders and had not been subjected to a measure of “expulsion” (i.e., deportation). Therefore, in the Government’s view, it could not have been a “collective expulsion”.

227. The Government further observed that in the present case the refusal-of-entry orders had been individual documents drawn up for each of the applicants and issued after a careful examination of the respective situation. They had been based on the identification of the applicants, as confirmed by the Tunisian Consul in Italy, and the removal had been implemented on the basis of a *laissez-passer* issued to each of them individually. In the Government’s submission, the meetings with the Tunisian Consul had been individual and effective, as shown by the fact that, following the establishment on those occasions of information about their age or nationality, some of the migrants listed by the Italian authorities had not been removed after all.

228. The respective refusal-of-entry orders, translated into the applicants’ mother tongue, had been notified to each of the applicants, who had refused to sign the record of notification. In the Government’s submission, those orders had been largely similar because, even though they had had the opportunity to do so, the applicants had not indicated any points worthy of note. These factors, in the Government’s view, distinguished the present case from *Čonka* (cited above, §§ 61-63), concerning the expulsion of a group of Slovakian nationals of Roma origin.

229. The Government lastly pointed out that the Palermo preliminary investigations judge, in his decision of 1 June 2012 (see paragraph 26 above), has taken the view that the refusal-of-entry measure was lawful and that the time-frame for the issuance of the orders had to be construed in the

light of the particular circumstances of the case. The first applicant, who had unlawfully entered Italy on 17 September 2011, had been removed on 29 September 2011; the two others, who had entered on 18 September, had been returned on 27 September. In the Government's view, those periods of twelve and nine days respectively could not be regarded as excessive.

### C. Third-party intervention

#### 1. *Coordination Française pour le droit d'asile*

230. This coalition of associations called upon the Court to retain the classification of "collective expulsion" where migrants had been identified, but where there was no indication in the circumstances of the case that their individual situations had undergone a genuine and effective examination. Such an examination might render absolutely necessary the systematic presence of an interpreter and an official trained to examine the situations of aliens and asylum-seekers, and a consistent pattern of circumstances could reflect an intention to carry out an expulsion *en masse*. The Coordination Française pour le droit d'asile took the view that the Chamber judgment fell squarely within the logic of the Court's case-law (it referred in particular to the *Čonka, Hirsi Jamaa and Others* and *Sharifi and Others* judgments, cited above) and was in phase with the relevant international practice (it referred, *inter alia*, to the judgment of the Inter-American Court of Human Rights of 28 August 2014 in the *Expelled Dominicans and Haitians v. Dominican Republic* case, and General Recommendation no. 30 of the United Nations Committee for the Elimination of Racial Discrimination). It asked the Court to exercise particular vigilance in cases where there were readmission agreements, which increased the risk of chain *refoulement* through fast-track procedures, and submitted that the safeguard under Article 4 of Protocol No. 4 ensured compliance with the obligation of *non-refoulement*. The absence of an explicit request for asylum did not release the State from that obligation. The expulsion of migrants without thoroughly examining their individual situation would significantly increase the risk of a breach of the *non-refoulement* principle.

#### 2. *The McGill Centre*

231. In the submission of the McGill Centre, Article 4 of Protocol No. 4 should be interpreted as imposing on the State a duty of procedural fairness towards each individual concerned by an expulsion decision, with safeguards that might vary depending on the context. The political and social context of expulsion decisions, in particular, should be taken into account (it referred, *inter alia*, to *Georgia v. Russia (I)*, cited above, § 171).

232. The Centre pointed out that collective expulsions were also prohibited under Article 22 § 9 of the American Convention on Human

Rights and by Article 12 § 5 of the African Charter on Human and Peoples' Rights, which added the need for a discriminatory dimension on national, racial, ethnic or religious grounds. It was true that, according to the committee of experts responsible for drafting the Protocol, Article 4 was supposed to prohibit "collective expulsions of aliens of the kind which have already taken place", referring to events in the Second World War. However, through its evolutive interpretation of this Article the Court had moved away from the context in which it was drafted and would no longer require the existence of discrimination in order to establish that the expulsion of a certain number of aliens was collective in nature.

233. It could be seen from the Court's case-law that there was a presumption of "collective" expulsion where there was an expulsion of aliens as a group. The State would then have a duty to show that it had guaranteed a fair and individual procedure to each expelled individual, through a reasonable and objective examination of his or her specific situation. The Court did not, however, impose a "mandatory decision-making process". A similar approach had been adopted by the United Nations Human Rights Committee and by the Inter-American Commission on Human Rights, which in its 1991 report on the "Situation of Haitians in the Dominican Republic" found that there had been a collective expulsion of Haitians by the Government of the Dominican Republic because the expelled individuals had not been given a formal hearing enabling them to claim their right to remain. According to the Commission, persons being expelled had the right to be heard and the right to know and to challenge the legal grounds for the expulsion.

### *3. The AIRE Centre and ECRE*

234. Relying on the preparatory work in respect of Protocol No. 4, on the International Law Commission's Draft Articles on the expulsion of aliens, and on the interpretation of Article 13 of the International Covenant on Civil and Political Rights, these two associations argued that Article 4 of Protocol No. 4 prohibited the "collectivity" of an expulsion and the lack of any individualised consideration of each personal situation. Compliance with that provision would reduce the risk of discriminatory treatment.

235. According to the AIRE Centre and ECRE, the fact that a State might generically be considered a "safe country" was not conclusive of the assumption that it was safe for the return of everyone. An individual assessment had to be made before the return, and the fact that the applicants had not alleged that their return to Tunisia had exposed them to a risk of a violation of Articles 2 or 3 of the Convention was immaterial. Similarly, in order to implement the UN Protocol against Smuggling of Migrants by Land, Sea and Air, individualised procedures had to be in place in order to identify the victims of human trafficking who wished to cooperate with the authorities. Moreover, the right of a migrant to be heard and to make known



his or her views effectively before the adoption of an expulsion decision had been upheld by the CJEU in the *Khaled Boudjlida* and *Sophie Mukarubega* judgments (cited above, see paragraphs 42-45 above).

236. The AIRE Centre and ECRE observed that Article 19 § 1 of the European Union Charter of Fundamental Rights prohibited collective expulsions and argued that at the material time Italy had been bound to comply with the Return Directive (see paragraph 41 above), not having expressly declared that it wished to apply Article 2 § 2 (a) of that instrument. The intervening associations also pointed out that in a decision adopted on 21 January 2016 in the case of *ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v. Secretary of State for the Home Department*, a United Kingdom court had held that vulnerable Syrian children in a camp in Calais, France, who had relatives in the United Kingdom should be transferred to that country immediately, as soon as they had filed their asylum applications in France.

#### **D. The Court's assessment**

##### *1. Principles established in the Court's case-law*

237. According to the Court's case-law, collective expulsion is to be understood as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group" (see *Georgia v. Russia (I)*, cited above, § 167; see also *Andric*, decision cited above; *Davydov v. Estonia* (dec), no. 16387/03, 31 May 2005; *Sultani*, cited above, § 81; and *Ghulami v. France* (dec), no. 45302/05, 7 April 2009). This does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4 (see *Čonka*, cited above, § 59, and *Georgia v. Russia (I)*, cited above, § 167).

238. The purpose of Article 4 of Protocol No. 4 is to prevent States from being able to remove a certain number of aliens without examining their personal circumstances and therefore without enabling them to put forward their arguments against the measure taken by the relevant authority (see *Hirsi Jamaa and Others*, cited above, § 177, and *Sharifi and Others*, cited above, § 210; see also *Andric*, decision cited above). In order to determine whether there has been a sufficiently individualised examination, it is necessary to consider the circumstances of the case and to verify whether the removal decisions had taken into consideration the specific situation of the individuals concerned (see *Hirsi Jamaa and Others*, cited above, § 183). Regard must also be had to the particular circumstances of the expulsion

and to the “general context at the material time” (see *Georgia v. Russia (I)*, cited above, § 171).

239. As the Court has previously observed, the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis (see, among other authorities, *M.A. v. Cyprus*, cited above, §§ 246 and 254; *Sultani*, cited above, § 81; *Hirsi Jamaa and Others*, cited above, § 184; and *Georgia v. Russia (I)*, cited above, § 167).

240. The Court has held that there is no violation of Article 4 of Protocol No. 4 where the lack of an individual expulsion decision can be attributed to the culpable conduct of the person concerned (see *Hirsi Jamaa and Others*, cited above, § 184; see also *M.A. v. Cyprus*, cited above, § 247; *Berisha and Haljiti v. the former Yugoslav Republic of Macedonia* (dec.), no. 18670/03, 16 June 2005; and *Dritsas v. Italy* (dec), no. 2344/02, 1 February 2011).

241. Without calling into question either the right of States to establish their own immigration policies (see *Georgia v. Russia (I)*, cited above, § 177), potentially in the context of bilateral cooperation, or the obligations stemming from membership of the European Union (see *Sharifi and Others*, cited above, § 224), the Court has pointed out that problems with managing migratory flows or with the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto (see *Hirsi Jamaa and Others*, cited above, § 179). The Court has also taken note of the “new challenges” facing European States in terms of immigration control as a result of the economic crisis, recent social and political changes which have had a particular impact on certain regions of Africa and the Middle East, and the fact that migratory flows are increasingly arriving by sea (see *M.S.S. v. Belgium and Greece*, cited above, § 223, and *Hirsi Jamaa and Others*, cited above, §§ 122 and 176).

242. The Court observes that to date it has found a violation of Article 4 of Protocol No. 4 in only four cases. In the first (*Čonka*, cited above, §§ 60-63) the measures of detention and removal had been adopted for the purpose of implementing an order to leave the country which made no reference to the applicants’ asylum request, whereas the asylum procedure had not yet been completed. In addition, a number of people had been simultaneously summoned to the police station, in conditions that made it very difficult for them to contact a lawyer, and the political bodies responsible had announced that there would be operations of that kind. The applicants in the second case (*Hirsi Jamaa and Others*, cited above, § 185) had not undergone any identity checks and the authorities had merely put the migrants, who had been intercepted on the high seas, onto military vessels to take them back to the Libyan coast. In *Georgia v. Russia (I)* (cited

above, §§ 170-78) the finding of a violation was based on a “routine of expulsions”, which had followed a recurrent pattern throughout Russia, the result of a coordinated policy of arrest, detention and expulsion of Georgians, who had been arrested under the pretext of examination of their documents, taken to Militia stations where they were gathered in large groups, and expelled after courts had entered into preliminary agreements to endorse such decisions, without any legal representation or examination of the particular circumstances of each case. In *Sharifi and Others* (cited above, §§ 214-25), lastly, the Court, taking into consideration a range of sources, found that the migrants intercepted in Adriatic ports were being subjected to “automatic returns” to Greece and had been deprived of any effective possibility of seeking asylum.

## 2. *Application of those principles in the present case*

243. The Court must first address the Government’s argument (see paragraph 226 above) that Article 4 of Protocol No. 4 is not applicable because the procedure to which the applicants were subjected was classified as a “refusal of entry with removal” and not as an “expulsion” (deportation). The Court notes that the International Law Commission (ILC) has defined “expulsion” as “a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State” (see Article 2 of the Draft Articles on the Expulsion of Aliens, cited in paragraph 46 above). In the same vein, the Court has previously noted that “the word ‘expulsion’ should be interpreted ‘in the generic meaning, in current use (to drive away from a place)’” (see *Hirsi Jamaa and Others*, cited above, § 174).

244. The Court sees no reason to reach a different conclusion in the present case. It observes that there is no doubt that the applicants, who were on Italian territory, were removed from that State and returned to Tunisia against their will, thus constituting an “expulsion” within the meaning of Article 4 of Protocol No. 4.

It remains to be established whether that expulsion was “collective” in nature.

245. In this connection, the ILC, informed by the Court’s case-law, has indicated that “collective expulsion means expulsion of aliens, as a group” (see Article 9 § 1 of the Draft Articles on the Expulsion of Aliens and the Commentary to that Article, cited in paragraphs 46 and 47 above). Turning now to the facts of the present case, the Court observes at the outset that the applicants have not disputed the fact that they underwent identification on two occasions: immediately after their arrival at the Contrada Imbriacola CSPA by Italian civil servants (see paragraph 12 above), and before they boarded the planes for Tunis, by the Tunisian Consul (see paragraph 18 above). However, the parties are not in agreement as to the conditions of the first identification. In the Government’s submission, it had consisted of a genuine individual interview, carried out in the presence of an interpreter or

cultural mediator, following which the authorities had filled out an “information sheet” containing personal data and any circumstances specific to each migrant (see paragraph 224 above). The applicants alleged, by contrast, that the Italian authorities had merely recorded their identities and fingerprints, without taking their personal situations into account and without any interpreter or independent legal adviser being present (see paragraph 214 above). They lastly disputed the Government’s allegation that there were individual information sheets concerning each migrant, observing that there was no evidence of this (see paragraph 222 above).

246. The Court notes that the Government provided a plausible explanation to justify their inability to produce the applicants’ information sheets, namely the fact that those documents had been destroyed in the fire at the Contrada Imbriacola CSPA (see paragraph 14 above). Moreover, it should be observed that the applicants did not dispute the Government’s submission that ninety-nine “social operators”, three social workers, three psychologists, and eight interpreters and cultural mediators worked at the CSPA (see paragraph 152 above). In that context, the Court also notes that, according to the report of the PACE Ad Hoc Sub-Committee (see paragraph 49 above), interpreters and cultural mediators worked on Lampedusa from February 2011 onwards (see § 28 of that report). It is reasonable to assume that those persons intervened to facilitate communication and mutual understanding between the migrants and the Italian authorities.

247. In any event, the Court is of the opinion that at the time of their first identification, which according to the Government consisted in taking their photographs and fingerprints (see paragraph 224 above), or at any other time during their confinement in the CSPA and on board the ships, the applicants had an opportunity to notify the authorities of any reasons why they should remain in Italy or why they should not be returned. In that context it is significant that, as stated by the Government (see paragraph 225 above) and the Palermo preliminary investigations judge (see paragraphs 25 and 27 above), and not disputed by the applicants, seventy-two migrants held in the Lampedusa CSPA at the time of the fire expressed their wish to apply for asylum, thus halting their return and resulting in their transfer to other reception centres. It is true that the applicants stated that their individual circumstances did not allow them to invoke international protection (see paragraph 222 above). Nevertheless, in an expulsion procedure the possibility of lodging an asylum application is a paramount safeguard, and there is no reason to assume that the Italian authorities, which heeded the wishes of other migrants who sought to rely on the *non-refoulement* principle, would have remained unreceptive in response to the submission of other legitimate and legally arguable impediments to their removal.

248. The Court would point out that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances; the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State.

249. In the present case, the applicants, who could reasonably have expected to be returned to Tunisia in view of the conditions of their arrival on the Italian coast, remained for between nine and twelve days in Italy. Even assuming that they encountered objective difficulties in the CSPA or on the ships (see, in particular, §§ 49 and 50 of the PACE Ad Hoc Sub-Committee's report, cited in paragraph 49 above), the Court is of the view that during that not insignificant period of time the applicants had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy.

250. The Court further notes that on 27 and 29 September 2011, before boarding the planes for Tunis, the applicants were received by the Tunisian Consul, who recorded their identities (see paragraph 18 above); they thus underwent a second identification. Even though it was carried out by a representative of a third State, this later check enabled the migrants' nationality to be confirmed and gave them a last chance to raise arguments against their expulsion. The Government, whose claims on this point are not disputed by the applicants, substantiated them by pointing out that, after details as to their age or nationality had been established during their meetings with the Tunisian Consul, some of the migrants listed by the Italian authorities had not been removed after all (see paragraph 227 above).

251. The Chamber rightly observed that the refusal-of-entry orders had been drafted in comparable terms, only differing as to the personal data of each migrant, and that a large number of Tunisian migrants had been expelled at the relevant time. However, according to the case-law cited in paragraph 239 above, those two facts cannot in themselves be decisive. In the Court's view, the relatively simple and standardised nature of the refusal-of-entry orders could be explained by the fact that the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion. It is therefore not unreasonable in itself for those orders to have been justified merely by the applicants' nationality, by the observation that they had unlawfully crossed the Italian border, and by the absence of any of the situations provided for in Article 10 § 4 of Legislative Decree no. 286 of 1998 (political asylum, granting of refugee status or the adoption of temporary protection measures on humanitarian grounds, see paragraphs 19 and 33 above).

252. It follows that in the particular circumstances of the case, the virtually simultaneous removal of the three applicants does not lead to the conclusion that their expulsion was “collective” within the meaning of Article 4 of Protocol No. 4 to the Convention. It may indeed be explained as the outcome of a series of individual refusal-of-entry orders. Those considerations suffice for the present case to be distinguished from the cases of *Čonka*, *Hirsi Jamaa and Others*, *Georgia v. Russia (I)* and *Sharifi and Others* (all cited and described in paragraph 242 above), such as to preclude the characterisation of the applicants’ expulsion as “collective”.

253. The Court would observe, moreover, that the applicants’ representatives, both in their written observations and at the public hearing (see paragraph 222 above), were unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients’ presence on Italian territory and preclude their removal. This calls into question the usefulness of an individual interview in the present case.

254. To sum up, the applicants underwent identification on two occasions, their nationality was established, and they were afforded a genuine and effective possibility of submitting arguments against their expulsion.

There has therefore been no violation of Article 4 of Protocol No. 4.

255. This finding makes it unnecessary for the Court to address the question whether, as the Government argued (see paragraph 223 above), the April 2011 agreement between Italy and Tunisia, which has not been made public, can be regarded as a “readmission” agreement within the meaning of the Return Directive (see paragraph 41 above), and whether this could have implications under Article 4 of Protocol No. 4.

## VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLES 3 AND 5 OF THE CONVENTION AND WITH ARTICLE 4 OF PROTOCOL No. 4

256. The applicants complained that they had not been afforded an effective remedy under Italian law by which to raise their complaints under Articles 3 and 5 of the Convention and under Article 4 of Protocol No. 4.

They relied on Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

### A. Chamber judgment

257. The Chamber began by considering that, to the extent that the applicants relied on Article 13 in conjunction with Article 5, their complaint

was covered by the Court's findings under Article 5 § 4 (see paragraph 161 of the Chamber judgment).

258. It went on to find a violation of Article 13 taken together with Article 3. It observed that the Government had not indicated any remedies by which the applicants could have complained about the conditions of their accommodation in the CSPA or on the ships. Moreover, an appeal to the Justice of the Peace against the refusal-of-entry orders would have served merely to challenge the lawfulness of their removal to Tunisia, and those orders had been issued only at the end of their period of confinement (see paragraphs 168-70 of the Chamber judgment).

259. In addition, the Chamber noted that in the context of an appeal against the refusal-of-entry orders, the Justice of the Peace could assess their lawfulness in the light of domestic law and the Italian Constitution. The Chamber found that the applicants could thus have complained that their expulsion was "collective" in nature and that there was nothing to suggest that such a complaint would have been disregarded by the judge. Nevertheless, the orders expressly stipulated that the lodging of an appeal with the Justice of the Peace would not have suspensive effect, and this appeared to run counter to the case-law set out by the Grand Chamber in its *De Souza Ribeiro v. France* judgment ([GC], no. 22689/07, § 82, ECHR 2012). On that basis the Chamber found a violation of Article 13 taken together with Article 4 of Protocol No. 4 (see paragraphs 171-73 of the Chamber judgment).

## **B. The parties' submissions**

### *1. The applicants*

260. The applicants alleged that it had not been possible for them to submit to the Italian authorities a complaint about the degrading conditions to which they had been subjected during their deprivation of liberty. They added that the refusal-of-entry orders had provided for the possibility of an appeal, within a period of sixty days, to the Agrigento Justice of the Peace. However, such a remedy would not have stayed the execution of the removal. The applicants argued that it was clear from the Court's case-law (they referred in particular to *Hirsi Jamaa and Others*, cited above, § 206) that the suspensive nature of a remedy was, in such matters, a condition of its effectiveness. That was merely a logical consequence of the hermeneutic principle that, to be effective, Convention provisions must be interpreted in a manner which guaranteed rights that were practical and effective and not theoretical and illusory. In the applicants' view, the assessment of the lawfulness of the expulsion must therefore take place before the measure is enforced.

261. The applicants alleged that the violation that they had sustained was even more serious than that found by the Court in the *Čonka* case (cited above), in a situation where the domestic legislation had provided, *in abstracto*, that a stay of execution could be ordered. In the present case, however, the refusal-of-entry orders had clearly indicated that appeals against them could never have suspensive effect.

262. In addition, the applicants denied having received copies of the orders, as was proven, in their view, by the fact that their signatures did not appear on the records of notification. Nor had they been able to obtain legal assistance, because lawyers had no access to holding facilities and could not be contacted by telephone from inside such premises.

263. As regards the decisions of the Agrigento Justice of the Peace annulling two refusal-of-entry orders (see paragraph 31 above), the applicants observed that they had concerned two migrants who had not yet been removed and who, in accordance with Article 14 of Legislative Decree no. 268 of 1998, had been placed in a CIE. The migrants in question, they explained, had challenged the lawfulness of the refusal-of-entry measure as the legal basis for their detention in the CIE, and they had been able to do so because they were still on Italian soil. The applicants observed that, unlike those migrants, they themselves could only have challenged their refusal-of-entry orders as the legal basis for their removal, and then only after their return to Tunisia.

## 2. *The Government*

264. The Government maintained their argument that the applicants had been entitled to appeal to the Agrigento Justice of the Peace against the refusal-of-entry orders (see paragraph 126 above).

### **C. Third-party intervention**

265. The AIRE Centre and ECRE argued that, even in the absence of an express indication to that effect, the Return Directive (see paragraph 41 above) and the Schengen Borders Code, read in the light of the Convention and the EU Charter of Fundamental Rights, should be interpreted to mean that in the event of collective expulsion, remedies against removal should have automatic suspensive effect.

### **D. The Court's assessment**

266. The Court would begin by observing, as the Chamber did, that, according to its settled case-law, Article 5 § 4 of the Convention provides a *lex specialis* in relation to the more general requirements of Article 13 (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 69, ECHR 1999-II, and *Ruiz*



*Rivera v. Switzerland*, no. 8300/06, § 47, 18 February 2014). In the present case, the facts giving rise to the applicants' complaint under Article 13 of the Convention in conjunction with Article 5 are identical to those already examined under Article 5 § 4, and are thus covered by the Court's findings under the latter provision (see *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, § 60, Series A no. 77, and *Chahal*, cited above, §§ 126 and 146).

267. It remains to be examined whether there has been a violation of Article 13 taken together with Article 3 of the Convention and Article 4 of Protocol No. 4.

#### *1. Principles established in the Court's case-law*

268. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, *Kudła*, cited above, § 157, and *Hirsi Jamaa and Others*, cited above, § 197).

#### *2. Application of those principles in the present case*

269. The Court first notes that it declared admissible the applicants' complaints under the substantive head of Article 3 of the Convention and under Article 4 of Protocol No. 4. Even though, for the reasons given above, it did not find a violation of those two provisions, it nevertheless considers that the complaints raised by the applicants thereunder were not manifestly ill-founded and raised serious questions of fact and law requiring examination on the merits. The complaints in question were therefore "arguable" for the purposes of Article 13 of the Convention (see, *mutatis mutandis*, *Hirsi Jamaa and Others*, cited above, § 201).

**(a) Alleged violation of Article 13 of the Convention taken together with Article 3**

270. Like the Chamber, the Court observes that the Government have not indicated any remedies by which the applicants could have complained about the conditions in which they were held in the Contrada Imbriacola CSPA or on the ships *Vincent* and *Audace*. An appeal to the Justice of the Peace against the refusal-of-entry orders would have served only to challenge the lawfulness of their removal. Moreover, those orders were issued only at the end of their period of confinement.

271. It follows that there has been a violation of Article 13 taken together with Article 3 of the Convention.

**(b) Alleged violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4**

272. In so far as the applicants complained of the lack of any effective remedy by which to challenge their expulsion from the perspective of its collective aspect, the Court notes that the refusal-of-entry orders indicated expressly that the individuals concerned could appeal against them to the Agrigento Justice of the Peace within a period of sixty days (see paragraph 19 above). There is no evidence before the Court to cast doubt on the effectiveness of that remedy in principle. Moreover, the Government adduced two decisions of the Agrigento Justice of the Peace showing that, on an appeal by two migrants, the judge examined the procedure followed for the issuance of the refusal-of-entry orders in question and assessed the lawfulness of that procedure in the light of domestic law and the Constitution. The Justice of the Peace decided, in particular, that the orders should be declared null and void on the ground that an excessive length of time had elapsed between the identification of each irregular migrant and the adoption of the order (see paragraphs 30-31 above). Like the Chamber, the Court sees no reason to doubt that, in the event of an appeal against a refusal-of-entry order, the Justice of the Peace would also be entitled to examine any complaint about a failure to take account of the personal situation of the migrant concerned and based therefore, in substance, on the collective nature of the expulsion.

273. The Court further notes that it can be seen from the records of notification appended to the refusal-of-entry orders that the addressees refused to “sign or to receive a copy” of those documents (see paragraph 20 above). The applicants did not adduce any evidence that would cast doubt on the veracity of that annotation. They cannot therefore blame the authorities either for any lack of understanding on their part of the content of the orders, or for any difficulties that their lack of information might have caused for the purposes of lodging an appeal with the Agrigento Justice of the Peace.

274. While there was certainly a remedy available, it would not, “in any event”, have suspended the enforcement of the refusal-of-entry orders (see paragraph 19 above). The Court must therefore determine whether the lack of suspensive effect, in itself, constituted a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4.

275. The Chamber answered that question in the affirmative, basing its finding on paragraph 82 of the judgment in *De Souza Ribeiro* (cited above), which reads as follows:

“Where a complaint concerns allegations that the person’s expulsion would expose him to a real risk of suffering treatment contrary to Article 3 of the Convention, in view of the importance the Court attaches to that provision and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised, the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50), and reasonable promptness (see *Bati and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV). In such a case, effectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Gebremedhin [Gaberamadhién]*, cited above, § 66, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, ECHR 2012). The same principles apply when expulsion exposes the applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention. Lastly, the requirement that a remedy should have automatic suspensive effect has been confirmed for complaints under Article 4 of Protocol No. 4 (see *Čonka*, cited above, §§ 81-83, and *Hirsi Jamaa and Others*, cited above, § 206).”

276. The Court observes that, while the last sentence of the above-cited paragraph 82 certainly appears to establish the need for “a remedy with automatic suspensive effect ... for complaints under Article 4 of Protocol No. 4”, it cannot be read in isolation. On the contrary, it must be understood in the light of the paragraph as a whole, which establishes an obligation for States to provide for such a remedy where the person concerned alleges that the enforcement of the expulsion would expose him or her to a real risk of ill-treatment in breach of Article 3 of the Convention or of a violation of his or her right to life under Article 2, on account of the irreversible nature of the harm that might occur if the risk of torture or ill-treatment materialised. It should also be noted that the last statement in paragraph 82 of the *De Souza Ribeiro* judgment is corroborated by the citation of the *Čonka* (cited above, §§ 81-83) and *Hirsi Jamaa and Others* (cited above, § 206) judgments. However, those two cases concerned situations in which the applicants had sought to alert the national authorities to the risk that they might be subjected to treatment in breach of Article 3 of the Convention in the destination countries, and not to any allegation that their expulsion from the host State was collective in nature.

277. The Court takes the view that where, as in the present case, an applicant does not allege that he or she faces violations of Articles 2 or 3 of the Convention in the destination country, removal from the territory of the respondent State will not expose him or her to harm of a potentially irreversible nature.

278. The risk of such harm will not obtain, for example, where it is argued that the expulsion would breach the person's right to respect for his or her private and family life. That situation is envisaged in paragraph 83 of the *De Souza Ribeiro* judgment, which must be read in conjunction with the preceding paragraph, and which reads as follows:

“By contrast, where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 of the Convention in conjunction with Article 8 requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see *M. and Others v. Bulgaria*, no. 41416/08, §§ 122-32, 26 July 2011, and, *mutatis mutandis*, *Al-Nashif v. Bulgaria*, no. 50963/99, § 133, 20 June 2002).”

279. In the Court's view, similar considerations apply where an applicant alleges that the expulsion procedure was “collective” in nature, without claiming at the same time that it had exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention. It follows that in such cases the Convention does not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but merely requires that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. The Court finds that the Agrigento Justice of the Peace satisfied those requirements.

280. The Court would also point out that the fact that the remedy available to the applicant did not have suspensive effect was not a decisive consideration for the conclusion reached in the *De Souza Ribeiro* case that there had been a violation of Article 13 of the Convention. That conclusion was based on the fact that the applicant's “arguable” complaint, to the effect that his removal was incompatible with Article 8 of the Convention, had been dismissed rapidly, in fact extremely hastily (the applicant had appealed to the Administrative Court on 26 January 2007 at 3.11 p.m., and had been deported to Brazil on the same day at around 4 p.m. – see *De Souza Ribeiro*, cited above, §§ 84-100, and in particular §§ 93-94 and 96).

281. It follows that the lack of suspensive effect of a removal decision does not in itself constitute a violation of Article 13 of the Convention

where, as in the present case, the applicants do not allege that there is a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country.

Accordingly, there has been no violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4.

## VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

282. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### A. Damage

283. The applicants claimed 65,000 euros (EUR) each in respect of the non-pecuniary damage that they alleged to have sustained. They argued that this amount was justified on account of the gravity of the violations of which they were victims. They requested that this sum be paid into their own Tunisian bank accounts.

284. The Government took the view that the applicants’ claims for just satisfaction were “unacceptable”.

285. Having regard to the particular circumstances of the case and to the conclusions it has reached as to the applicants’ various complaints, the Court finds that each applicant should be awarded EUR 2,500 in respect of non-pecuniary damage, amounting to a total of EUR 7,500 for all three applicants.

### B. Costs and expenses

286. The applicants also claimed EUR 25,236.89 for the costs and expenses incurred by them before the Court. That sum covered: the travel expenses of their representatives for a visit to Tunis (EUR 432.48); the travel expenses of their representatives for attendance at the Grand Chamber hearing (EUR 700); the translation of the observations before the Chamber (EUR 912.03) and before the Grand Chamber (EUR 1,192.38); the consultation of a lawyer specialising in international human rights law (EUR 3,000) and a lawyer specialising in immigration law (EUR 3,000); and the fees of their representatives in the proceedings before the Court (in total, EUR 16,000). The applicants’ representatives stated that they had advanced those expenses and requested that the sum awarded be paid directly into their respective bank accounts.

287. The Government submitted no observations on this point.

288. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and to its case-law, the Court considers excessive the total sum claimed for the costs and expenses incurred in the proceedings before it (EUR 25,236.89). It decides to award EUR 15,000 under that head to the applicants jointly. That sum is to be paid directly into the bank accounts of the applicants' representatives (see, *mutatis mutandis*, *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 219, ECHR 2013).

### **C. Default interest**

289. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT**

1. *Holds*, unanimously, that the Government are estopped from raising the objection that domestic remedies have not been exhausted;
2. *Dismisses*, unanimously, the Government's preliminary objection that Article 5 is inapplicable in the present case;
3. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;
4. *Holds*, unanimously, that there has been a violation of Article 5 § 2 of the Convention;
5. *Holds*, unanimously, that there has been a violation of Article 5 § 4 of the Convention;
6. *Holds*, unanimously, that there has been no violation of Article 3 of the Convention on account of the conditions in which the applicants were held at the Contrada Imbriacola CSPA;
7. *Holds*, unanimously, that there has been no violation of Article 3 of the Convention on account of the conditions in which the applicants were held on the ships *Vincent* and *Audace*;

8. *Holds*, by sixteen votes to one, that there has been no violation of Article 4 of Protocol No. 4 to the Convention;
9. *Holds*, unanimously, that there has been a violation of Article 13 of the Convention taken together with Article 3 of the Convention;
10. *Holds*, by sixteen votes to one, that there has been no violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4;
11. *Holds*, by fifteen votes to two, that the respondent State is to pay to each applicant, within three months, EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
12. *Holds*, unanimously,
  - (a) that the respondent State is to pay to the applicants jointly, within three months, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable to them, in respect of costs and expenses, to be paid into the bank accounts of their representatives;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on this amount, and the amount awarded in operative paragraph 11, at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
13. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 December 2016.

Johan Callewaert  
Deputy to the Registrar

Luis López Guerra  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Raimondi;
- (b) partly dissenting opinion of Judge Dedov;
- (c) partly dissenting opinion of Judge Serghides.

L.L.G.  
J.C.



## CONCURRING OPINION OF JUDGE RAIMONDI

(Translation)

1. I fully agree with this judgment of the Grand Chamber. While it confirms the Chamber judgment in a number of aspects, finding violations of Article 5 §§ 1, 2 and 4 of the Convention, a violation of Article 13 taken together with Article 3 of the Convention, and no violation of Article 3 of the Convention as to the conditions in which the applicants were held on the ships *Vincent* and *Audace*, there are other findings from which the Grand Chamber departs.

2. That departure concerns the conclusion in the present judgment that there has been no violation of Article 3 of the Convention on account of the conditions in which the applicants were held in the CSPA of Contrada Imbriacola, no violation of Article 4 of Protocol No. 4 to the Convention, and no violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4. On these three points the majority in the Chamber, including myself, had found violations.

3. Following the examination of the case by the Grand Chamber, I am now persuaded that on these three points the latter has rightly reached findings of no violation. I thus propose to set out in this opinion a few brief remarks on those three aspects.

### **I. No violation of Article 3 of the Convention on account of the conditions in which the applicants were held in the Contrada Imbriacola CSPA**

4. As to the conditions in which the applicants were held in the Contrada Imbriacola CSPA, the Chamber first noted that, on account of the events surrounding the “Arab Spring”, the island of Lampedusa had had to deal with an exceptional situation in 2011, characterised by significant arrivals of migrants and a humanitarian crisis, thus placing many obligations on the Italian authorities and creating organisational and logistical difficulties (see paragraphs 124-27 of the Chamber judgment). However, in the Chamber’s view those factors could not release the respondent State from its obligation to guarantee that the conditions of the applicants’ detention were compatible with the principle of respect for their human dignity, having regard to the absolute terms of Article 3 of the Convention (see paragraph 128 of the Chamber judgment). The Chamber then took the view that the reports of the Italian Senate’s Special Commission, of Amnesty International and of the PACE Ad Hoc Sub-Committee corroborated the applicants’ allegations about the overcrowding and general lack of hygiene in the CSPA, hence the finding of a violation of Article 3 of the Convention in spite of the short

length – two or three days – of the applicants’ stay in the centre (see paragraphs 130-36 of the Chamber judgment).

5. Having reconsidered the situation in the light of the Grand Chamber’s deliberations, I now believe that it is true that, in view of the exceptional nature of the situation and other factors such as the applicants’ young age and good health, and especially the brevity of the period in which they were exposed to the undeniably difficult living conditions in the Contrada Imbriacola CSPA, the solution adopted by the majority should be approved. It is particularly consistent with the Court’s solution in the case of *Aarabi v. Greece* (no. 39766/09, §§ 42-51, 2 April 2015), concerning the detention pending removal of a young Lebanese migrant, during which he had been held for a very short period (11 to 13 July 2009) on coastguard premises on the island of Chios, and in other facilities (including thirteen days at the Mersinidi detention centre, which had not been criticised in international reports in respect of the relevant period; and a report for a subsequent period had not, in any event, mentioned any problems of hygiene).

6. The present judgment clearly highlights the situation of extreme difficulty facing the Italian authorities at the relevant time, on account of an exceptional influx of migrants and complications resulting from the revolt in the CSPA.

7. Therefore, as stated by the Grand Chamber, while the constraints inherent in such a crisis cannot, in themselves, justify a breach of Article 3, it would certainly be artificial to examine the facts of the case without taking into account the general context.

8. With that premise in mind, I fully share the Grand Chamber’s analysis and findings on this point (see, in particular, paragraphs 187-201 of the judgment).

## **II. No violation of Article 4 of Protocol No. 4 to the Convention**

9. As to the question whether, in the present case, the measure taken constituted a collective expulsion, as prohibited by Article 4 of Protocol No. 4 to the Convention, the Grand Chamber has replied in the negative.

10. The Chamber, for its part, noted that the applicants had been returned on the basis of individual refusal-of-entry orders, but that those orders were drafted in identical terms, the only differences being the personal details. In the Chamber’s view, even though the applicants had undergone an identification procedure, that did not, in itself, show that there had not been a collective expulsion within the meaning of Article 4 of Protocol No. 4. In addition, the Chamber observed that the refusal-of-entry orders did not contain any reference to the applicants’ personal situations and that the Government had not produced any document capable of proving that individual interviews concerning the specific situation of each

applicant had taken place. The Chamber also took account of the fact that a large number of individuals of the same origin had, in the relevant period, been returned in the same manner as the applicants, and it pointed out that the bilateral agreement of April 2011 between Italy and Tunisia – which had not been made public – provided for the readmission of irregular migrants from Tunisia through simplified procedures, merely on the basis of the identification by the Tunisian consular authorities of the individuals concerned. The Chamber found these elements to suffice for it to reach the conclusion that the expulsion was collective in nature.

11. The factors highlighted by the Chamber are not insignificant, because the mechanism in place enabled the authorities, in substance, to remove the applicants merely on the basis of their being part of a group, without specifically inviting them to submit any reasons that might support an application for international protection.

12. However, I would observe, firstly, that I find the analysis of the facts by the Grand Chamber to be reasonable. The judgment notes that upon their first identification, which, according to the Government involved the taking of photographs and fingerprints (see paragraph 224 of the judgment), as well as at any other time during their detention in the CSPA and on board the ships, the applicants had an opportunity to inform the authorities of any reasons that might justify their stay in Italy or preclude their return. The judgment also emphasises the fact that, as the Government (see paragraph 225 of the judgment) and the Palermo preliminary investigations judge (paragraphs 25 and 27) pointed out, without this being denied by the applicants, seventy-two migrants in the Lampedusa CSPA at the time of the fire had expressed their intention to submit an asylum application, thereby halting the return procedure concerning them and resulting in their transfer to other reception centres. It is true that the applicants declared that their personal circumstances did not enable them to seek international protection (see paragraph 222 of the judgment), but, as noted by the Grand Chamber, the possibility of lodging an asylum application in the context of an expulsion procedure is a paramount safeguard and there is nothing to suggest that the Italian authorities, which were prepared to listen to migrants wishing to invoke the *non-refoulement* principle, would have remained unresponsive if they had been made aware of other legitimate and legally arguable impediments to the applicants' removal.

13. Secondly, the Chamber's main concern was to protect the applicants from an expulsion that had not been preceded by a stringent examination of their personal situations, but the following comments can be seen to address that concern.

14. In the light of the Grand Chamber's deliberations, I can agree with the level of protection laid down in paragraph 248 of the judgment, where it is stated that Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances; and that the requirements of this

provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State.

15. I thus approve the finding that there has been no violation of Article 4 of Protocol No. 4 to the Convention.

### **III. No violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4**

16. As to the complaint alleging a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4, the majority in the Chamber, finding a violation of that provision, noted that in the context of an appeal against the refusal-of-entry orders, the Justice of the Peace was entitled to assess the lawfulness of the orders in the light of domestic law and the Italian Constitution. The Chamber concluded that the applicants could have complained about the collective nature of their expulsion and that there was nothing to show that such a complaint would have been disregarded by the Justice of the Peace. Nevertheless, according to the Chamber, an appeal to the Justice of the Peace would not have had suspensive effect, and that appeared to run counter to the case-law set out by the Grand Chamber in *De Souza Ribeiro v. France* ([GC], no. 22689/07, § 82, ECHR 2012).

17. Following the Grand Chamber’s deliberations, I have no difficulty acknowledging that the Chamber’s reading of the *De Souza Ribeiro v. France* judgment went beyond what was required by that case-law.

18. As to the lack of suspensive effect of the procedure in question, the Grand Chamber notes that while *De Souza Ribeiro* seemed to establish a need for “a remedy with automatic suspensive effect ... for complaints under Article 4 of Protocol No. 4”, the last sentence of paragraph 82 of that judgment has to be understood in the light of the whole paragraph, which established an obligation for States to provide for such a remedy where the person concerned alleged that the enforcement of the expulsion would expose him or her to a real risk of ill-treatment in breach of Article 3 of the Convention or of a violation of his or her right to life under Article 2, on account of the irreversible nature of the harm that might occur if the risk materialised. The Grand Chamber further notes that the last statement in paragraph 82 of the *De Souza Ribeiro* judgment is corroborated by the citation of the judgments in *Čonka v. Belgium* (no. 51564/99, §§ 81-83, ECHR 2002-I) and *Hirsi Jamaa and Others v. Italy* ([GC], no. 27765/09, § 206, ECHR 2012). However, those two cases concerned situations in which the applicants had sought to alert the national authorities to the risk that they might be subjected to treatment in breach of Article 3 of the

Convention in the destination countries, and not to any allegation that their expulsion from the host State was collective in nature.

19. I share that reading of the *De Souza Ribeiro* case-law and the Grand Chamber's conclusion that where, as in the present case, an applicant does not allege that any violations of Articles 2 and 3 of the Convention could arise in the destination country, removal from the respondent State would not expose him or her to potentially irreversible harm and the existence of a suspensive remedy is not therefore necessary to meet the requirements of Article 13 of the Convention taken together with Article 4 of Protocol No. 4.

\* \* \*

In conclusion, I believe that this important judgment provides balanced and reasonable answers to the difficult questions raised in the present case, and contributes to establishing the Court's case-law on key points in the context of an unprecedented migration crisis which will certainly continue to cause applications to be sent to Strasbourg. Such applications on migration matters, whether they are already pending or will be arriving henceforth, will be examined by the Court on the basis of particularly precise and clear jurisprudential principles, especially now that the present judgment has made a significant contribution to the consolidation of the relevant case-law.

## PARTLY DISSENTING OPINION OF JUDGE DEDOV

I agreed with the conclusion of the Court in finding certain violations of Article 5 of the Convention as a result of the absence of a legal basis and the “quality of law” principle, even if the initial detention of the irregular migrants was reasonable under the standards of the Convention, to prevent their unauthorised entry into the country (Article 5 § 1 (f)), and the authorities complied with all necessary procedural safeguards (concerning arbitrariness, assessment of lawfulness of entry, assessment of individual circumstances and time-frame). The applicants did not submit any arguments to prove that any principles or safeguards, including that of legal certainty, had been breached by the authorities, or that the applicants had not understood their legal status from the moment of their arrival.

Therefore, I cannot accept that “the applicants’ deprivation of liberty did not satisfy the general principle of legal certainty and was not compatible with the aim of protecting the individual against arbitrariness” (see paragraph 107 of the judgment). The same approach could be applied to the bilateral agreements between Italy and Tunisia, regardless of whether or not those agreements were accessible to the applicants (see paragraphs 102 and 103 of the judgment), as the applicants had put themselves in an unlawful situation, contrary to the presumption of the sovereign right of any State to control its borders.

Furthermore, in a critical situation of mass migration of aliens, when thousands of irregular migrants simultaneously arrive on the Italian coast, the obligation to limit the period of detention to “the time strictly necessary to establish the migrant’s identity and the lawfulness of his or her presence in Italy” (see paragraph 104 of the judgment), without taking into account the time needed to organise the expulsion measures or to validate the restriction of liberty for each migrant within forty-eight hours (see paragraph 105 of the judgment), would place an excessive burden on the authorities.

Moreover, the authorities provided the applicants with all necessary assistance to save their lives. In spite of that, the applicants refused to cooperate with the authorities and created inconvenience for other lawful residents, participating in a riot which caused mass disorder.

However, since the respondent Government have not even recognised the fact of detention, the necessity to improve the quality of the law could be considered an adequate message to the authorities from the Court. The authorities now have the opportunity to establish the same procedural safeguards for the purposes of any legitimate actions covered by Article 5 § 1 (f) of the Convention, with a view to deportation or extradition or, as in the present case, to prevent unauthorised entry into the country.

For these reasons, I voted against the award to the applicants in respect of non-pecuniary damage.

## PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. My only disagreement with the majority is that, to my regret, I am unable to join them in finding that there has been no violation of Article 4 of Protocol No. 4, or of Article 13 of the Convention taken together with the former. I agree with the majority that the word “expulsion” in Article 4 of Protocol No. 4 “should be interpreted in the generic meaning, in current use (to drive away from a place)” (see paragraphs 243-44 of the judgment), and I thus also agree with them when they reject the Government’s argument that Article 4 of Protocol No. 4 does not apply to the present case because the procedure to which the applicants were subjected was classified as a “refusal of entry with removal” (under the bilateral agreements between Italy and Tunisia) and not as an “expulsion”.

2. It is to be noted, at the outset, that Protocol No. 4 came into force in respect of Italy on 27 May 1982.

3. I adhere to the following reasoning in the Chamber judgment (paragraphs 156-57) to the effect that there had been a violation of Article 4 of Protocol No. 4:

“156. The Court is, however, of the opinion that the mere introduction of an identification procedure is not sufficient in itself to rule out the existence of a collective expulsion. It further observes that a number of factors lead to the conclusion that in the present case the impugned expulsion was indeed collective in nature. In particular, the refusal-of-entry orders did not contain any reference to the personal situations of the applicants; the Government failed to produce any document capable of proving that individual interviews concerning the specific situation of each applicant had taken place prior to the issuance of the orders; a large number of individuals of the same origin, around the time of the facts at issue, were subjected to the same outcome as the applicants; and the bilateral agreements with Tunisia (see paragraphs 28-30 above), which have not been made public, provided for the return of unlawful migrants through simplified procedures, on the basis of the mere identification of the person concerned by the Tunisian consular authorities.

157. Those factors suffice for the Court to rule out the existence of sufficient guarantees demonstrating that the personal circumstances of each of the migrants concerned had been genuinely and individually taken into account (see, *mutatis mutandis*, *Čonka*, cited above, §§ 61-63).”

### **A. Whether the simplified procedure for readmission, provided for in agreements between Italy and Tunisia, was followed in the present case**

4. It is clear from the judgment (paragraph 250) that the second identification that the applicants underwent was carried out before they boarded the planes for Tunis by the Tunisian Consul and not by a representative of the Italian authorities. That was precisely in accordance with the simplified procedure, on the basis of the mere identification of the person concerned by the Tunisian consular authorities, as provided for in

bilateral agreements with Tunisia and as mentioned in the above quoted passage from the Chamber judgment (§ 156).

5. In the *procès-verbal* of a meeting between the Minister of the Interior of the Tunisian Republic and the Minister of the Interior of the Italian Republic, at Tunis on 4 and 5 April 2011 (Annex 2<sup>ter</sup> to the referral request, § 2), it was agreed, *inter alia*, that “[t]he nationality of those Tunisian nationals who arrive in Italy after the signing of this *procès-verbal* will be verified by a simplified method at their place of arrival in Italy”. The 2011 agreement refers to and complements an earlier bilateral agreement, provided for in an Exchange of Notes of 6 August 1998 (*note verbale*, Annex 2 to the referral request). This more comprehensive text, under the heading “Readmission of nationals of the two countries” (Part II, § 1), states that it was agreed between the two countries as follows:

“Each Party shall, at the request of the other Party and without further formalities, readmit into its territory any person who does not meet the conditions of entry or residence applicable in the requesting State, in so far as it has been or can be established by the identification procedure that the person concerned is a national of the requested State.”

Under paragraph 5 of the same Part of the *note verbale* there was no mandatory obligation to conduct a personal interview, since this was apparently an exceptional measure at the discretion of the consular authority of the requested State (i.e. Tunisia, in the present case), with the aim of establishing the migrant’s nationality:

“If the consular authority of the requested State nevertheless considers it necessary notwithstanding all the means of identification provided for above, to hear the person concerned, in so far as is possible ... Where it is possible to establish the person’s nationality on the basis of that interview, the *laissez-passer* shall be issued forthwith.”

Neither does the 2011 agreement refer to any mandatory interview, merely that the “readmission must in all circumstances take place in the presence of the Tunisian consular authority”.

6. As is rightly mentioned in the applicants’ observations of 22 April 2016 (§ 64), they “were returned to Tunisia from Italy simply on the basis of their identification as Tunisian nationals and without proper examination of their personal situation”. This is also apparent from the admission of the Government in their request for referral to the Grand Chamber (§ 10), which reads as follows (all placed in emphasis in the original text):

“10. Regard being had to the above agreements, the Government submit that the judgment is incoherent *per se*, in particular in terms of the interpretation and application of Article 4 of Protocol No. 4 prohibiting the ‘collective expulsion of aliens’, which was not violated in this case because the applicants – who were neither under arrest nor in custody – were returned under the simplified procedure provided for in the agreements mentioned above, as Judges Sajó and Vučinić rightly point out in their ‘partly dissenting opinion’ annexed to the Chamber judgment.”



7. From the said bilateral agreements and the annexes to the *note verbale*, the texts of which are also attached to the Government's referral request, it is obvious that the purpose of the agreements was to reinforce cooperation between the two countries, by readmitting into their respective territories any person who did not meet the conditions of entry or residence, on the basis of nationality alone, without further formalities or a substantial personal interview and excluding the assistance of a lawyer. To the extent that any bilateral agreement does not require mandatory personal interviews for the collective expulsion of aliens, I believe that it violates the provisions of Article 4 of Protocol No. 4. Such a violation, with due respect, occurred in the present case, since these bilateral agreements were adhered to, instead of the provisions of Article 4 of Protocol No. 4, with the result that the competent authorities did not conduct any personal interviews. Since the bilateral agreement of 5 April 2011 had not been made public (see paragraph 37 of the judgment) and the applicants did not know why personal interviews were not conducted, the violation becomes even more striking. According to the case-law of this Court, States are considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010, and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 154, ECHR 2005-VI).

8. There has never been any reservation or declaration by Italy regarding Article 4 of Protocol No. 4. The only reservation made by Italy to Protocol No. 4 concerned Article 3, which was not applicable in the present case, and, in any event, concerned only the royal family and had been withdrawn on 12 November 2012. The fact that Italy has made no reservation or declaration regarding collective expulsions of Tunisian nationals, on the basis of its bilateral agreements with Tunisia, did not enable Italy to proceed in the present case on the basis of these agreements rather than that of Article 4 of Protocol No. 4.

9. As Professor James Crawford (Judge of the International Court of Justice) rightly observes, “collective expulsion of aliens is a serious breach of international law” (see James Crawford, “Chance, Order, Change: The Course of International Law”, *Collected Courses of the Hague Academy of International Law*, vol. 365, Leiden/Boston, 2013, p. 208, § 350). More specifically, he comments as follows:

“In principle, a State has the right to determine who shall enter its territory, subject to a few legal restrictions. Among these, collective expulsion of aliens is a serious breach of international law, and Article 4 is expressed as an absolute and non-derogable prohibition. As such, it must be interpreted narrowly and precisely.”

**B. Whether the procedural obligation to conduct personal interviews under Article 4 of Protocol No. 4 is mandatory and whether the corresponding procedural right is absolute**

10. The majority point out that “Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances”, and that “the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion, and where those arguments are examined in an appropriate manner by the authorities of the respondent State” (paragraph 248 of the judgment). They also observe that “the applicants’ representatives both in their written observations and the public hearing ..., were unable to indicate the slightest factual or legal ground which, under international or national law, could have justified their clients’ presence on Italian territory and preclude their removal”. They continue by remarking that “[t]his calls into question the usefulness of an individual interview in the present case” (paragraph 253 of the judgment).

11. I believe, however, that for the purposes of Article 4 of Protocol No. 4 the procedural obligation of the competent national authorities to conduct a personal interview is indispensable. This obligation would serve to fulfil the aim of the provision. It is clearly a safeguard to be applied without exception, and thus does not undermine the prohibition formulated in absolute terms. The prohibition of collective expulsion in that Article is, ultimately: (a) a prohibition of arbitrariness, and (b) a prohibition of discrimination. Because of their nature, collective expulsions of aliens are presumed to be carried out arbitrarily and in a discriminatory manner, unless, of course, it is guaranteed to each alien that the procedural obligation will be fulfilled by the State concerned.

12. With all due respect, I am unable to follow the interpretation of Article 4 of Protocol No. 4 adopted by the majority, for the following reasons:

(a) This interpretation departs from the Court’s previously established case-law, according to which the aim of Article 4 of Protocol No. 4 is invariably to prevent States from being able to proceed with collective expulsions of aliens without examining, through the procedure of a personal interview, the individual circumstances of each one. In other words, this interpretation disregards the mandatory nature of the procedural obligation of the authorities to conduct personal interviews in all cases engaging Article 4 of Protocol No. 4. This may lead to: (i) giving the authorities the choice of deciding to abstain from upholding the rule of law, i.e., from the fulfilment of their said procedural obligation, at the expense of satisfying the principles of effectiveness and legal certainty; (ii) making the Convention safeguards dependent merely on the discretion of the police or the immigration authorities, against whom the allegation of a violation is

directed, and thereby not only making the supervisory role of the Court difficult, but even undermining it and rendering it unnecessary; (iii) disregarding the need for aliens in a collateral expulsion case to be protected against any risk of arbitrariness or abuse of power; and (iv) discouraging, even aliens who are facing violations of Articles 2 and 3 of the Convention, from approaching the borders of European countries, when they know that their procedural safeguards remain at the discretion of the authorities.

(b) It removes the burden of proof, which is on the State, to show that a personal interview has been conducted under Article 4 of Protocol No. 4, by reversing it and shifting it to the individual alien, who is supposed to prove that he or she would have a genuine and effective possibility of obtaining international or other legal protection, even though this is not required by Article 4 of Protocol No. 4.

(c) It subjects the absolute procedural right enjoyed by an alien under Article 4 of Protocol No. 4, securing him or her protection from collective expulsion, to the condition that he or she must have a genuine and effective possibility of obtaining international or other legal protection. To put it differently, it places an implied exception or limitation on the said provision, rendering the guarantee inapplicable to any alien who does not present, to the satisfaction of the immigration authorities, an arguable legal claim to international or other legal protection.

(d) It significantly limits the ambit of the prohibition formulated in absolute terms and the application of Article 4 of Protocol No. 4, both *ratione personae* and *ratione materiae*, thus contravening its purpose, object and effectiveness, and undermining the requisite level of protection. As will be shown below, the purpose of this provision is to prohibit, in absolute terms, the simultaneous indiscriminate expulsions of aliens who are members of the same group, merely on the basis of their membership in the group, or their religion or nationality, without the individual circumstances of each alien being taken into account by the competent authorities through the procedure of personal interviews. A personal interview is important because this is the best means of fulfilling the aim of Article 4 of Protocol No. 4 to avoid human herding, by way of indiscriminate collective expulsion, thus diminishing human dignity.

(e) It subjects or subjugates the procedural obligation, which is at the heart of the ban on collective expulsion under Article 4 of Protocol No. 4, to the existence of a substantive obligation, which does not exist under the Article, with the effect that the former is negated. In other words, it does not take into account the fact that the procedural guarantee vanishes whenever a personal interview is not conducted, and the Court accepts the submission of the respondent State that the applicants did not have a substantive right to put forward arguments against the measure or that they did not submit any claim despite allegedly having the opportunity to do so. It overlooks the

point that the absence of an explicit request for asylum or international protection should not release the State from its procedural obligation.

(f) By limiting the application of Article 4 of Protocol No. 4 only to persons who have a genuine and effective possibility of obtaining international or other legal protection, the majority disregard the fact that this provision, unlike Article 2 § 1 of the same Protocol, which is confined only to persons lawfully resident within the territory of a State, applies whether the aliens entered the territory of a State lawfully or unlawfully, and if lawfully, whether or not they remain lawful entrants. As will be explained below, Article 4 of Protocol No. 4 applies mainly to aliens who have unlawfully entered the territory of a State.

(g) Lastly, the said interpretation absolutely deprives Article 4 of Protocol No. 4 of its procedural guarantee, by taking away from the procedural right its shield of protection.

13. The majority adopt the Government's view that the applicants really underwent a personal interview, even though the Chamber (see Chamber judgment, § 156) found that there was absolutely no evidence to support the Government's general contention that each situation had been assessed individually, and moreover, despite the fact that the Government did not challenge this finding by the Chamber in their referral request. The applicants rightly pointed out in their observations (cited above, § 80), that this failure by the Government to challenge the finding should have been seen by the Court as the Government's acceptance of the facts as presented in the Chamber judgment.

14. Irrespective of what is said in the previous paragraph – to be explained in more detail below – the Government adduced no evidence that personal interviews had been conducted, but only raised general, vague, unproven and unconvincing allegations.

15. It should be observed that the procedural guarantee of Article 4 of Protocol No. 4 applies only to cases of collective expulsion of aliens, and not to the case of an expulsion of an alien who entered the territory of a State not as a member or part of a group but alone (individual expulsion). On the contrary, Article 3 § 2 of Protocol No. 4 provides for the non-deprivation of the right of a person to enter and move within the territory of the State of which he or she is a national. So, in my view, the aim of Article 4 of Protocol No. 4 was to prohibit collective expulsion of aliens as such and not to guarantee, as the majority decide, that every alien who enters a State should at least be able to rely on international or other legal protection, or on the *non-refoulement* principle.

16. In the applicants' observations to the Court (cited above, § 127), they say – while at the same time hoping that it will not happen – that it “would be a serious and unjustified backward step in human rights protection in the field of expulsion”, for this Court, not “to confirm the principle that foreign nationals, whatever their legal status, can only be

expelled or deported after the person concerned has been granted an individual interview with the authorities”. I believe this statement is correct, especially considering the evolutive or dynamic approach of the Court in relation to the interpretation of other provisions of the Convention. The Court has on many occasions held that the Convention is a “living instrument” and has given a broad interpretation, expanding the fundamental rights and freedoms. In the present case, however, the majority attach a restrictive interpretation to the essence of an absolute procedural right, contrary to the Court’s approach to another absolute right, namely the right to be free from torture or inhuman or degrading treatment or punishment under Article 3 (see, *inter alia*, *Tyrer v. the United Kingdom*, 25 April 1978, § 81, Series A no. 26, and *Bouyid v. Belgium* [GC], no. 23380/09, § 90, ECHR 2015). Such an interpretation of Article 4 of Protocol No. 4 is, in my view, contrary to the wording and object of the relevant provision and departs from the previous case-law of the Court.

17. The idea that the Convention is a living instrument, together with the principle of effectiveness (“*effet pratique*”, “*ut res magis valeat quam pereat*”), forming the “bedrock” of evolutive interpretation (as characterised by R.C.A. White and C. Ovey (eds) in Jacobs, White and Ovey, *The European Convention on Human Rights* (fifth edition, Oxford, 2010, pp. 73 *et seq.*), are particularly referred to by the Court in *Hirsi Jamaa and Others v. Italy* ([GC], no. 27765/09, § 175, ECHR 2012), when dealing with Article 4 of Protocol No. 4 as follows:

“... account must be taken of the purpose and meaning of the provision in issue, which must themselves be analysed in the light of the principle, firmly rooted in the Court’s case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, for example, *Soering*, cited above, § 102; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *X, Y and Z v. the United Kingdom*, 22 April 1997, Reports 1997-II; *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I). Furthermore, it is essential that the Convention is interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 136, ECHR 2005-XI).”

Though the above passage, invoked by the applicants in their observations (cited above, § 81), concerns a different issue of interpretation of Article 4 of Protocol No. 4, a similar effective interpretation should be applied when it comes to the issue in question.

18. The effectiveness of the provision of Article 4 of Protocol No. 4, like any other provision of the Convention, is ensured by taking into account its object and purpose in good faith. As the International Law Commission Report 1966 (*Yearbook of the International Law Commission* [YBILC], 1966, vol. II, p. 239, § 6) pertinently expounded:

“... When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation be adopted.”

In my view, good faith and the objects and purposes of Article 4 of Protocol No. 4 require the need to conduct personal interviews invariably in all collective expulsion cases. Without doubt, States have an obligation to act in good faith in using their power to expel a group of aliens.

19. One should also note in this respect what was said very profoundly by Professor Rudolf Bernhardt, a former President of the Court, in his article entitled “Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights” (*German Yearbook of International Law*, vol. 42 (1999), 11 at p. 14):

“These articles [31 and 32] of the Vienna Convention [on the Law of Treaties] are remarkable in several respects. Firstly, one principle of treaty interpretation, which was often invoked in older text books, is not even mentioned. Namely, the principle that treaties should be interpreted restrictively and in favor of State sovereignty, *in dubio mitius*. This principle is no longer relevant, it is neither mentioned in the Vienna Convention nor has it ever been invoked in the recent jurisprudence of international courts and tribunals. Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions. Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite to the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other.”

Moreover, at page 16 he also made the following comment about the role of the object and purpose of a treaty:

“The object and purpose of a treaty plays, as shown in previous quotations, a central role in treaty interpretation. This reference to object and purpose can be understood as entry into a certain dynamism.”

20. In *Hirsi Jamaa and Others* (cited above, § 177) it was clearly held as follows:

“The Court has already found that, according to the established case-law of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain [*sic*] aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority.”

It appears from the above statement (especially from the absolute terms “without examining” and “without enabling”), which encapsulates the principle of the existing case-law to date, that the procedural obligation under Article 4 of Protocol No. 4 is mandatory, giving no discretion to the States not to exercise it (note the words “to prevent States *being able* to remove”, emphasis added). The right of all aliens in a collective expulsion scenario is an autonomous procedural right. The said provision and the relevant case-law do not go to the merits of the case or to the results of

compliance with the procedural obligation. Besides, according to the above passage, an alien can put forward his or her arguments against the measure taken by the relevant authority and this does not apply only when there is an effective possibility of submitting arguments against expulsion, for example in an asylum procedure. Without a personal interview, as was the case here, there is automatically a violation of Article 4 of Protocol No. 4. It is immaterial what the applicants' lawyers said in the oral hearing, namely that "the applicants' individual circumstances did not enable them to rely on international protection or the *non-refoulement* principle" (see paragraph 222 of the judgment). That cannot, in my view, undermine the applicants' case, because what was important for them was to have an interview and have the right to put forward their arguments against the measure taken, whether these arguments were valid or not, and whether or not they had any arguments at all, considering that they did not have, at the time, the assistance of a lawyer to explain their legal rights to them. Their lawyers in the oral hearing said that they were not in a position to say on which legal grounds their clients could have relied to justify their stay in Italy. And that was, of course, a genuine statement, since the applicants have not applied *ex post facto* for leave to remain in Italy or called for a remedy to that end. They have only challenged before the Court the failure by the Italian authorities to comply with their procedural obligation under Article 4 of Protocol No. 4.

21. In the judgment (see paragraph 237) under the section "principles established in the Court's case-law", it is rightly stated that:

"According to the Court's case-law, collective expulsion is to be understood as 'any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of reasonable and objective examination of the particular case of each individual alien of the group' ..."

An examination cannot, of course, be reasonable and objective, as stated in this passage, without a personal interview conducted by the authorities.

22. The prohibition of collective expulsion in Article 4 of Protocol No. 4 concerns only the procedure and not the substantive grounds for expulsion. Unlike Article 1 § 2 of Protocol No. 7, which makes provision for grounds unconditionally permitting an individual expulsion of aliens lawfully resident in the territory of a State (i.e. expulsion "necessary in the interest of public order" or "grounded on reasons of national security"), Article 4 of Protocol No. 4 does not contain a similar provision, but only a prohibition of collective expulsion.

23. Even supposing that Article 4 of Protocol No. 4 were to guarantee, apart from a procedural right, also a substantive right, imposing correspondingly on the national authorities both a procedural and a substantive obligation, a failure to fulfil the procedural obligation would suffice to violate Article 4 of Protocol No. 4. This is the case regarding other provisions of the Convention, such as Articles 2, 3 and 8, on which the

jurisprudence is clear, namely that these provisions guarantee both substantive and procedural rights and that the corresponding obligations of the State are separate, independent and autonomous. For instance, in *Celniku v. Greece* (no. 21449/04, §§ 54, 59 and 70, 5 July 2007) the Court found a violation of Article 2 of the Convention only under its procedural head, and not also under its substantive head.

24. The applicants rightly argued in their observations (cited above, § 126) that their interpretation of Article 4 of Protocol No. 4 was in line with customary international law and the case-law of the Court of Justice of the European Union, to the effect that aliens have the right to express their views on the legality of their stay. This argument may receive support from the principle of “external coherence”, according to which “a treaty cannot be interpreted in vacuum, but must be considered as part of a wider legal system” (see Daniel Rietiker, “The Principle of ‘Effectiveness’ in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*”, *Nordic Journal of International Law*, vol. 79, no. 2 (2010), p. 271). It is to be noted that pursuant to Article 31 § 3(c) of the VCLT, “[t]here shall be taken into account, together with the context: ... (c) Any relevant rules of international law applicable in the relations between the parties”.

25. All the third parties which intervened in the proceedings before the Grand Chamber used cogent arguments in line with the applicants’ interpretation of Article 4 of Protocol No. 4. The Coordination Française pour le droit d’asile “took the view that the Chamber judgment fell squarely within the logic of the Court’s case law ... and was in phase with the relevant international practice ...” (see paragraph 230 of the judgment). They further argued that: “The absence of an explicit request for asylum did not release the State from that obligation. The expulsion of migrants without thoroughly examining their individual situation would significantly increase the risk of a breach of the *non-refoulement* principle” (see paragraph 230 of the judgment). The McGill Centre pertinently observed that “[i]t could be seen from the Court’s case-law that there was a presumption of ‘collective’ expulsion where there was an expulsion of aliens as a group. The State would then have a duty to show that it had guaranteed a fair and individual procedure to each expelled individual through a reasonable and objective examination of his or her specific situation” (paragraph 233 of the judgment). Lastly, the AIRE Centre and ECRE rightly argued as follows (paragraph 235 of the judgment):

“... the fact that the State might generally be considered ‘a safe country’ was not conclusive of the assumption that it was safe for the return of everyone. An individual assessment had to be made before the return, and the fact that the applicants had not alleged that their return to Tunisia had exposed them to a risk of a violation of Articles 2 and 3 of the Convention was immaterial. ... Moreover, the right of a migrant to be heard and to make known his or her views effectively before the adoption of an



expulsion decision had been upheld by the CJEU in the *Khaled Boudjlida* and *Sophie Mukarubega* judgments ...”

26. One may conclude from the above that, for the obligation of a State to be fulfilled effectively under Article 4 of Protocol No. 4, it must first be given effect through the procedure of a personal interview.

**C. Whether the procedural obligation for conducting personal interviews under Article 4 of Protocol No. 4 was in fact complied with in the present case**

27. As to the facts, the majority accept the Government’s submission that there had been personal interviews with the applicants, carried out in the presence of an interpreter or cultural mediator, the records of which, however, had been destroyed by fire during a revolt, and reject the applicants’ claim that there had been no personal interviews at all. With due respect, the majority made this finding without considering that the burden of proof as to the existence of a personal interview was on the Government, which had produced no evidence to the Court, or that the Chamber had made a finding on this point, in favour of the applicants, which had not been challenged by the Government in their referral request.

28. The majority consider plausible the explanation given by the Government that the applicants’ information sheets had been destroyed in the fire, as well as considering it reasonable to assume that, since a number of specialists worked at the Early Reception and Aid Centre (CSPA), these persons must have intervened to facilitate communication and mutual understanding between the migrants and the Italian authorities.

29. Even assuming that the Government’s submission that the documents in question were destroyed in the fire on 20 September 2011 was true, since the applicants were in Italy for at least a further week the Italian authorities should have conducted another interview and should have made a fresh record – an obligation which they signally failed to fulfil. On the contrary, the second identification prior to the applicants’ departure from Italy was carried out by a representative of a third State, and not by the Italian authorities (see paragraph 250 of the judgment). The Government did not give any explanation at all as to why their authorities had not proceeded with a second interview, since the records of the first interview had been destroyed by fire. Even assuming that the authorities had been facing some administrative difficulties at the material time on account of the revolt, they should have abstained from proceeding with the expulsions until they were able to repeat the personal interviews.

30. In the relevant refusal-of-entry orders (see the text thereof in paragraph 19 of the judgment) only a reference to the identification of the applicants was made, without anything being said about a personal interview, and this is another strong indication, or even proof, that no such

interview was conducted. The similarity between the orders, with their otherwise identical wording, generally reflects the failure to take account of the applicants' personal circumstances.

31. I believe that no reasonable assumption in favour of the Government's line of argument could be drawn from the fact that a number of specialists were working at the CSPA, as the majority accept. If there was an interview assisted by an interpreter or a cultural mediator, all of the persons involved in the interview should have been named by the Government and could have been made available to offer evidence about the interview and its context, but this was not even suggested. If the Government did not remember whether and in the presence of whom an interview was conducted, which seems to be the case, they could not logically and convincingly argue that, because, allegedly, there were interviews with all migrants, this might also have been the case for the applicants. One cannot base the proof of an alleged specific fact, in this case the alleged interviews of the applicants, on a general hypothesis as to a practice when, firstly, it is vague, uncertain and not particularly credible, and secondly, it might not have been applied in the specific case, for many reasons. A fact must, according to the rules of evidence and principles of logic, be specifically proved and cannot be supported only by generalities and uncertain assumptions. Not only must an interview be shown to have been conducted, but also, and, most importantly, its content must be proved. Thus, even if it were to be assumed that the applicants were asked some questions by the authorities, but the relevant details remain unknown, it could not be said with certainty that what occurred was a personal interview, and, most importantly, it would be impossible to know the answers that were given to the questions asked. Without a record and specific details, this Court would be unable to exercise its supervisory jurisdiction, as it would lack the opportunity to examine whether the procedural obligation of Article 4 of Protocol No. 4 was fulfilled.

32. By analogy, according to the constant case-law of the Court, when there is no official record of an individual's arrest and ensuing detention, this failure or omission must in itself be considered a most serious shortcoming. More specifically, the absence of a record is considered to entail a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention, securing the right to liberty and security. It discloses a most grave violation of that provision and is incompatible with the requirement of lawfulness and with the very purpose of Article 5 (see *Fedotov v. Russia*, no. 5140/02, § 78, 25 October 2005; *Menesheva v. Russia*, no. 59261/00, § 87, ECHR 2006-III; and *Kurt v. Turkey*, 25 May 1998, § 125, *Reports of Judgments and Decisions* 1998-III). The lack of a proper record of an individual's arrest and detention is thus sufficient for the Court to find that there has been a violation of Article 5 § 1 (see *Anguelova v. Bulgaria*, no. 38361/97, § 157, ECHR

2002-IV, and *Menesheva*, cited above, §§ 87-89). If this formality of keeping an official record is indispensable for the guarantee of a non-absolute right, as it is for the right under Article 5 § 1, one may wonder why such a formality should not, all the more so, be indispensable for the guarantee of an absolute procedural right, as is the right secured by Article 4 of Protocol No. 4.

33. The Court should have adopted, regarding the issue of the personal interview of which no evidence was produced by the Government, the same approach to acceptance of evidence as that which it followed concerning the alleged conditions on the ships on which the applicants were placed. On the latter issue, the Court rightly declined to accept the applicants' allegations, since, as it found, those allegations were "not based on any objective reports, merely their own testimony" (see paragraph 204 of the judgment).

34. In the present judgment, emphasis is placed on the fact that "the applicants did not dispute the Government's submission that ninety-nine social operators, three social workers, three psychologists, and eight interpreters and cultural mediators worked at the CSPA ..." (see paragraph 246). However, this alleged fact was irrelevant for the applicants in relation to their submission that they did not have a personal interview, as one cannot expect them to consider it important, for the purposes of their counter-argument, how many people were working at the CSPA at the material time and what they were doing. By the same logic, for a person who is a victim of a crime, it is immaterial how many policemen are working in the town where it is committed. His or her only concern might be that he or she was not protected by the police and that the police did not catch the perpetrator.

35. It is important to underline that the Government were not even in a position to specify whether, during the alleged interview, there was an interpreter "or" a cultural mediator actually present (see paragraph 224 of the judgment). Nor did they specify how many of these eight specialists were interpreters and how many were cultural mediators. In any event, there were only eight such specialists, and the reference to any other specialist, like social operators, social workers and psychologists (see paragraph 246 of the judgment), was, with due respect, not only irrelevant, but also misleading, because the allegation of the Government as to who could have been present at the interview was confined only to an interpreter or a cultural mediator. Moreover, at the CSPA, at the relevant time, there were a considerable number of foreign nationals, as is indicated in the judgment (see paragraphs 180 and 182). It is thus possible that the number of interpreters or cultural mediators may not have been sufficient in order to attend to all the needs as required. In other words, the administrative infrastructure needed to properly process so many expulsions in a short period of time was not necessarily adequate. One does not know, after all, how many of these interpreters or cultural workers were working on the date

when the personal interviews allegedly took place. Since the burden of proof that a personal interview was actually conducted is on the Government, and, since they could not name the person who conducted the alleged interview or offer the Court any evidence from him or her as to the content of the interview, any such allegation could only be speculative, without having any evidential weight, not even on the standard of the “balance of probabilities”. However, I believe that the standard of proof in such cases must be high and specifically “beyond reasonable doubt”, since the procedural right guaranteed under Article 4 of Protocol No. 4 is absolute, and the procedural obligation of the respondent State thereunder is mandatory. In other words, a State which expels aliens *en masse* is presumed to be in violation of Article 4 of Protocol No. 4 unless it can prove, beyond reasonable doubt, that it followed due process regarding every alien in the group, through a procedure involving personal interviews.

36. The applicants argued that there were no records of their personal interviews, not because they were destroyed by fire, but because there was no personal interview to be recorded. Why should one accept the position of the Government, which despite it being their obligation to conduct a personal interview provided the Court with no evidence at all to that effect, and not accept the position of the three applicants that there were no such personal interviews and that the authorities signally failed to fulfil their procedural obligation under Article 4 of Protocol No. 4?

37. Not only were there no records available to prove that a personal interview had been conducted, there were also no records available to prove that an opportunity had been given to the applicants to notify the authorities of any reasons why they should remain in Italy or why they should not be returned. As to the opportunity allegedly given to the applicants to raise any claim if they so wished, again, the Government’s allegation was general in nature as can be seen from paragraph 225 of the judgment:

“In the Government’s view, the applicants, like all the other migrants, had definitely been informed of the possibility of lodging an asylum application, but they simply decided not to make use of that avenue.”

Consequently, the majority’s stance, accepting as persuasive such a general allegation of the Government, could not but amount to an assumption, as shown in paragraph 247 of the judgment:

“Nevertheless, in an expulsion procedure the possibility of lodging an asylum application is a paramount safeguard, and there is no reason to assume that the Italian authorities which heeded the wishes of other migrants who sought to rely on the *non-refoulement* principle, would have remained passive in response to the submission of other legitimate and legally arguable impediments to their removal.”

38. The majority, accepting the allegation of the Government, say that “the applicants had an opportunity to notify the authorities of any reasons why they should remain in Italy or why they should not be returned” (paragraph 247 of the judgment). First of all, there was no allegation by the

Government that they had kept any record of having informed the applicants about their rights, or evidence that such a record ever existed. But how could the allegation of the Government about informing the applicants be persuasive or valid, when no documentary evidence was produced to prove this. Even assuming that there was no documentary evidence because it was destroyed in the fire, the authorities had a positive obligation to afford the applicants a fresh opportunity to raise any claims they may have had and to make a record accordingly. In the absence of records, one cannot know if the authorities informed the applicants about their rights, and if the applicants reported anything relevant to the authorities. Why should one accept the allegation of the Government that they informed the applicants of the possibility of lodging an asylum application, when the authorities were following the summary procedure provided for by the bilateral agreements to expel the applicants?

39. In the judgment (paragraph 249) it is stated:

“Even assuming that [the applicants] encountered objective difficulties in the CSPA or on the ships ..., the Court is of the view that during that not insignificant period of time the applicants had the possibility of drawing the attention of the national authorities to any circumstance that might affect their status and entitle them to remain in Italy.”

Since, according to the majority, the period during which the applicants stayed in Italy was not insignificant, thus allowing them the time to draw the attention of the national authorities to any claim they had, this period could equally, and even more importantly, have been used by the authorities in order to repeat the alleged personal interviews, if the Government’s allegation that the records of the interview had been destroyed in the fire was true. In view of the facts of the case, and despite the vulnerable or difficult situation of the applicants, it is my opinion that the applicants were not afforded by the authorities an opportunity to have a personal interview or to raise any claim or to obtain legal assistance. It is true, moreover, that collective expulsions of aliens without procedural guarantees create among them feelings of uncertainty.

40. The Court unanimously found that the respondent State had violated Article 5 § 2 of the Convention, which provides that “[e]veryone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”. This finding, I believe, is more consistent with my view, that the authorities showed a similar failure and lack of diligence and caution regarding the issue of personal interviews under Article 4 of Protocol No. 4, than with the stance of the Government, which argued that they had complied with the provisions of both Article 5 § 2 and Article 4 of Protocol No. 4. Why should one expect the authorities to inform the applicants about their rights, when they did not even inform them about the reasons for their arrest? After all, as has been said above, the simplified bilateral agreements between Italy

and Tunisia were applied for the return of the applicants, in the absence of any representative of the Italian authorities in the readmission procedure.

41. With due respect, an argument drawn by the majority from the alleged fact that seventy-two migrants held in the Lampedusa CSPA had expressed their wish to apply for asylum (paragraph 247 of the judgment) is not quite relevant, firstly, because there is no examination in this case of the circumstances of these other migrants, who may or may not have undergone a personal interview, in order to compare them with the circumstances of the applicants, and, secondly, because, as has been said above, there was no record to prove what actually happened or what was said or claimed, if anything. In any event, why should one take into account what happened to those seventy-two migrants, about whom the Court has no information, and not take into account the Chamber’s findings that “a large number of individuals of the same origin around the time of the events in issue, had been subjected to the same outcome as the applicants”, that “the agreement between Italy and Tunisia of April 2011, which had not been made public, provided for the return of unlawful migrants from Tunisia through simplified procedures, on the basis of the mere identification by the Tunisian consular authorities of the person concerned” (paragraph 213 of the judgment), and, ultimately, that “[t]hose elements sufficed for the Chamber to find that the applicants’ expulsion had been collective in nature and that Article 4 of Protocol No. 4 had therefore been breached ...” (ibid.)?

42. In conclusion, I believe that it is not proven that the applicants underwent personal interviews for the purposes of Article 4 of Protocol No. 4 and that the Italian authorities had signally failed to fulfil their procedural obligations.

**D. Whether the adjective “collective” in Article 4 of Protocol No. 4 refers to the “measure” or the “procedure” leading to the expulsion of aliens, or whether it is quantitative in nature**

43. The question arises as to what is the true meaning of the adjective “collective” in Article 4 of Protocol No. 4, which is of central importance for the determination of the notion of “collective expulsion”.

44. In the judgment (paragraph 244), though the question is raised as to whether the expulsion was “collective” in nature, nothing is said, however, about any necessary quantitative requirement for the meaning of the phrase “collective expulsion” under Article 4 of Protocol No. 4. However, in the judgment, it is assumed, without being clearly stated, that the application, had it not been for the other reasons given in the judgment, would not have been dismissed under Article 4 of Protocol No. 4 on the basis that the applicants were only three in number, not meeting any greater numerical threshold under the said provision, as was the view of two of the judges in the Chamber, Judges Sajó and Vučinić, in their joint partly dissenting

opinion. According to these two judges, who interpreted Article 4 of Protocol No. 4 in the light of its historical origins (see paragraphs 9 and 18 of their opinion), there had not been a “collective expulsion” in the present case, as the expulsion was not directed at an “entire group”, implying a large-scale deportation of aliens.

45. The adjective “collective” in Article 4 of Protocol No. 4, referring to the phrase “expulsion of aliens”, could most logically be indicative of the measure or the procedure for handling the expulsion of aliens as a group, and not of the number of the aliens involved in a group expulsion. Otherwise, adjectives such as “massive” or “substantial” would have been used instead. The case-law of this Court (see references in the judgment, paragraph 237), when referring to the adjective “collective”, gives it the meaning of a group (“as a group”), without any distinction being made between groups according to the number of their members. Since Article 4 of Protocol No. 4 and the case-law of this Court do not distinguish on a numerical basis, neither should one introduce such a distinction, in accordance with the Latin maxim *ubi lex non distinguit, nec nos distinguere debemus* (7 *Coke’s Reports*, 5).

46. Support for the view that the adjective “collective” in Article 4 of Protocol No. 4 refers to a “measure” or “procedure”, rather than to a quantitative or numerical figure can be derived from the wording of the previous Article of the same Protocol, namely Article 3 § 1, which makes provision for the prohibition of expulsion of nationals. Article 3 § 1 reads as follows:

“1. No one shall be expelled, by means of an individual or a collective measure, from the territory of the State of which he is a national.”

The key words in Article 3 § 1 supporting the present argument are: the adjectives “individual” and “collective”, used disjunctively, and probably as antonyms; the phrase “by means of”; and the noun “measure”, to which the adjectives “individual” and “collective” refer.

47. It is clear, therefore, from the above-mentioned analysis that the same adjective, namely “collective”, which is used in the two provisions, Article 3 and Article 4 of Protocol No. 4, has or should have the same meaning, thus referring to the “measure” or “procedure” for the handling of expulsions of people as a group. It is a sound rule of construction, which I believe applies also in regard to the Convention’s provisions, to give the same meaning to the same words or phrases occurring in different parts of a legal instrument, unless it is otherwise made clear (see F.A.R. Bennion, *Bennion on Statutory Interpretation: a Code*, fifth edition, London, 2008, pp. 1160 and 1217 and the relevant common law case-law cited therein). In accordance with a systemic interpretation and the principle that the Convention should be interpreted as a whole and its different parts should be understood *noscitur a sociis*, Articles 3 and 4 of Protocol No. 4 should be

read in conjunction and the phrase “collective expulsion” should be interpreted in association with the other terms of Article 3 § 1 in their context and reading Protocol No. 4 as a whole. Such an interpretation is in line with Article 31 § 1 of the Vienna Convention on the Law of Treaties (VCLT) of 1969, which provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. This provision reflects the rule that the same words should have the same meaning, if the ordinary meaning is to be given to the same terms in a treaty. The Court in *Hirsi Jamaa and Others* (cited above, §§ 170-71), dealing with a different issue under Article 4 of Protocol No. 4 clearly referred to the above-mentioned principles of interpretation under the VCLT:

“170. In interpreting the provisions of the Convention, the Court draws on Articles 31 to 33 of the Vienna Convention on the Law of Treaties (see, for example, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 65, ECHR 2008; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008).

171. Pursuant to the Vienna Convention on the Law of Treaties, the Court must establish the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken. It must take account of the fact that the provision in issue forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). The Court must also take account of any relevant rules and principles of international law applicable in the relations between the Contracting Parties (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; see also Article 31 § 3 (c) of the Vienna Convention). The Court may also have recourse to supplementary means of interpretation, notably the *travaux préparatoires* of the Convention, either to confirm the meaning determined in accordance with the methods referred to above or to clarify the meaning when it would otherwise be ambiguous, obscure or manifestly absurd and unreasonable (see Article 32 of the Vienna Convention).”

48. It is also apparent from the *travaux préparatoires* in respect of Protocol No. 4, as a supplementary means of interpretation under Article 32 VCLT, that the phrase “collective expulsion” is used as having the same meaning in regard to both nationals and aliens. In paragraph 32 of its report, the Committee of Experts on Human Rights to the Committee of Ministers (see *Collected Edition of the “Travaux Préparatoires” of Protocol No. 4*, Strasbourg, 1976, p. 669), states the following:

“This provision [Article 4 of Protocol No. 4] refers to collective expulsion of aliens, including stateless persons. The collective expulsion of nationals is prohibited under Article 3, paragraph 1.”



49. Also, in paragraph 33 of the same report, the Committee of Experts states:

“It was agreed that the adoption of this Article [Article 4 of Protocol No. 4] and paragraph 1 of Article 3 could in no way be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past.”

50. In addition, the Court in *Hirsi Jamaa and Others*, cited above, § 174, read Articles 3 and 4 of Protocol No. 4 in conjunction, regarding the meaning of “expulsion” in the two Articles, thus further supporting the proposed common meaning of the adjective “collective”:

“... Lastly, according to the drafters of Protocol No. 4, the word ‘expulsion’ should be interpreted ‘in the generic meaning, in current use (to drive away from a place)’. While that last definition is contained in the section relating to Article 3 of the Protocol, the Court considers that it can also be applied to Article 4 of the same Protocol.”

51. In *Theory and Practice of the European Convention on Human Rights* (P. Van Dijk, F. Van Hoof, A. Van Rijn and L. Zwaak (eds), fourth edition, Antwerp-Oxford, 2006), Chapter 23 on “Prohibition of Collective Expulsion of Aliens (Article 4 of Protocol No. 4)” (revised by J. Schokkenbroek, p. 955), it is elegantly explained that the decisive criterion for the application of Article 4 of Protocol No. 4 is the procedure leading to the expulsion and neither the number of which the group consists nor the link knitting together its members:

“Even then, however, the question of what exactly distinguishes the expulsion of a group of aliens from the expulsion of a numbers of individual aliens has not yet been answered. How large must such a group be? Is the expulsion of an entire family to be considered a collective expulsion? And is this the case, for instance, for the expulsion of an orchestra or sport team consisting of foreigners? If so, why then do such ‘groups’ deserve more protection than a foreigner who lives on his own or an individual foreign musician or sportsman? This problem can be solved only if one uses neither the number of which the group consists nor the link knitting together the members of that group as the decisive criterion of the application of Article 4, but the procedure leading to the expulsion. If a person is expelled along with others without his case having received individual treatment, his expulsion is a case of collective expulsion.”

52. Article 4 of Protocol No. 4 contains a procedural guarantee of human dignity which is inherent in the Convention. What the Court profoundly said in *Bouyid* (cited above, § 81) regarding the prohibition of inhuman or degrading treatment or punishment, that it is “[i]ndeed ... a value of civilisation closely bound up with respect for human dignity”, applies also, in my view, regarding the prohibition of collective expulsion, in the sense that the lack of the procedural guarantee of a personal interview is inconsistent with the Convention’s fundamental values of a democratic society. It must be emphasised that the rights under Articles 3 and 4 of Protocol No. 4 are both absolute rights, which apply without exception. As rightly put by Professor Feldman, human dignity “may need to be taken into

account ... when interpreting the Convention rights themselves ...” (David Feldman, “Human Dignity as a Legal Value” – part II, *Public Law*, Spring 2000, p. 75). Therefore it would not have been the intention of the drafters of the Convention to limit the procedural guarantee of Article 4 of Protocol No. 4, underpinned as it is by human dignity, only to cases where the expulsion of people is numerically massive, and not also in the event of an arbitrary expulsion of smaller groups of aliens, not treating such people as a group under Article 4 of Protocol No. 4 and without requiring any reasonable and objective examination of the particular case of each alien in a group on a case-by-case basis involving a personal interview. The procedural guarantee of Article 4 of Protocol No. 4 is based on the idea that human herding and collective and indiscriminate removal diminish individuality and offend against personality, autonomy and human dignity. Thus, ultimately, it is human dignity that Article 4 of Protocol No. 4 seeks to protect. Again, it would be contrary to the idea of human nature and the purpose of the Convention for the Court to decide the issue in question on the basis of arithmetical considerations.

53. Even if, for the sake of argument, one were to be faced with two equally valid or arguable interpretations of Article 4 of Protocol No. 4, one would prefer that which favours the essence of the right (*in dubio in favorem pro libertate*) and, at the same time, does not limit the ambit of the said provision *ratione personae*, instead of the other, which would exclude from the protection of Article 4 small groups of aliens, like the group of applicants in the present case.

54. In conclusion, it is immaterial for the purposes of Article 4 of Protocol No. 4 that the applicants were only three in number. Besides, they were expelled back to their country as a group, merely on the basis of their nationality, something which the said provision prohibits.

#### **E. Whether lawfulness of residence or stay and the purpose of entry into the territory of a State are criteria for the application of Article 4 of Protocol No. 4**

55. Article 4 of Protocol No. 4 does not distinguish between groups of aliens according to whether they lawfully or unlawfully entered the territory of a State. Neither does it distinguish between different kinds of groups who unlawfully entered the territory of a State. So one ought not to make any such distinction, observing the above-mentioned principle *ubi lex non distinguit, nec nos distinguere debemus*. Otherwise the interpretation would be restrictive and contrary to the object of the provision.

56. The Committee of Experts, which finalised the draft of Article 4 of Protocol No. 4, made it absolutely clear (see “*Travaux Préparatoires*” of *Protocol No. 4*, cited above, p. 505, § 34), that the prohibition contained in

this Article applies to aliens irrespective of whether or not they reside or are domiciled in the territory of the State they have entered:

“34. This provision refers to collective expulsion of aliens. The term ‘aliens’ shall here be taken to mean all those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality. The collective expulsion of nationals is prohibited under Article 3.”

Apart from this clear explanation by the Committee of Experts, the evolution of the draft of Article 4 of Protocol No. 4 is interesting and supports the point at issue, namely that this Article was not confined only to aliens lawfully resident in the territory of a State. The original draft of the Article had actually, in its first two paragraphs, contained wording similar to that now to be found in Article 1 §§ 1 and 2 of Protocol No. 7, which deals expressly with individual expulsion of aliens lawfully resident in the territory of a State. But draft Article 4 of Protocol No. 4, in its third and last paragraph provided that: “Collective expulsion is prohibited” (*ibid.*, pp. 447 and 454). This last paragraph, unlike the first two, was intended to apply irrespective of the nationality or residence of the persons expelled (*ibid.*, pp. 481 and 505). The Committee of Experts ultimately decided not to include in Article 4 of Protocol No. 4 any provision concerning the individual expulsion of aliens lawfully residing in the territory of the State and it thus deleted the first two paragraphs, leaving only the expulsion of a group, but limiting it to aliens only, irrespective, of course, of the lawfulness of their residence (*ibid.*, pp. 490, 505 and 507). The Committee excluded the collective expulsion of nationals from this provision, as they were to be covered by Article 3 of Protocol No. 4. It was not until Protocol No. 7 came into force, about twenty-one years after the entry into force of Protocol No. 4, that the individual expulsion of aliens lawfully resident in the territory of a State was finally regulated. However, as regards individual expulsions of aliens who are unlawfully within the territory of a State, there is no provision in the Convention or its Protocols specifically regulating such matters, and this omission may or may not have been intentional.

57. It is true that where the drafters of the Convention intended to deal with the expulsion of an alien “lawfully resident in the territory of a State”, or, with restrictions on the freedom of movement of “everyone lawfully within the territory of a State”, they used the adverb “lawfully”, as they did in Article 1 of Protocol No. 7 and Article 2 § 1 of Protocol No. 4, respectively. It follows that in Article 4 of Protocol No. 4, where the drafters did not use the adverb “lawfully” or another similar term, the meaning is intentionally not limited to lawful residents.

58. Thus, the procedural guarantee of Article 4 of Protocol No. 4 applies to all aliens, including stateless persons, no matter whether or not they have

entered the territory of a State lawfully or have remained lawful entrants, although entry into the physical territory of the State, or residence in that territory, may not be required (see Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, third edition, Oxford, 2014, at p. 961 and note 88).

59. The said provision, however, applies mainly to the case of expulsion of persons who are not lawfully resident in the territory of a State, for example, groups of would-be or failed asylum seekers, of Roma or gypsies seeking a camp, of migrant workers seeking employment, of economic migrants, etc. This can be understood in the light of another protocol to the Convention, namely Protocol No. 7, which, although it does not concern collective expulsion, deals specifically and in detail (Article 1 thereof) with procedural safeguards relating to the individual expulsion of aliens lawfully resident in the territory of a State. Unlike, Article 4 of Protocol No. 4, which applies irrespective of the lawfulness of the residence of the applicants, Article 1 of Protocol No. 7 applies only to lawful residents in a State. Accordingly, in *Sulejmanovic and Sultanovic v. Italy*, no. 57574/00, 14 March 2002, the complaint under Article 1 of Protocol No. 7 was rejected on the ground that the applicants were not considered lawfully resident in Italy, but the complaint under Article 4 of Protocol No. 4 was declared admissible.

60. The Convention is a living instrument and its purpose is to provide its guarantees in response to the changing needs of modern society, considering also that the movement of people from one country to another is easier nowadays than in the past, and the causes and reasons for such movements may differ in kind and in time. It is therefore immaterial if the applicants in the present case were economic migrants (if that is true, since no personal interview was conducted at the material time to ascertain the applicants’ true motives).

**F. Whether the circumstances surrounding the implementation of an expulsion decision, and the decision of implementation itself, play a role in the application of Article 4 of Protocol No. 4**

61. The question arises, whether, apart from the conduct of a personal interview which, in my view, is mandatory in all cases, the circumstances surrounding the implementation of an expulsion decision, and the decision of implementation itself, play a role in determining whether Article 4 of Protocol No. 4 has been complied with.

62. The answer should, in my view, be in the affirmative. The failure to conduct a personal interview, which should be mandatory, leads to a violation of the above provision *per se*. But, the conduct of a personal interview is the minimum procedural guarantee required by Article 4 of Protocol No. 4. This guarantee is to be secured by all High Contracting

Parties to everyone within their jurisdiction, as provided by Article 1 of the Convention. If a State, despite the conduct of personal interviews, nevertheless ignores the personal circumstances of each alien forming a group and proceeds with the simultaneous expulsions of all members of the same group merely on the basis of their nationality, religion or membership of a group, without considering the individual circumstances of each alien, it still violates Article 4 of Protocol No. 4, because it goes against the aim of the said provision. One should not confuse the prohibition of collective expulsion in Article 4 of Protocol No. 4 on a basis other than the personal circumstances of each of the aliens involved, which is a procedural guarantee and at the same time the aim of the provision, with any arguable substantive right an alien may have to remain in a territory. Thus the circumstances surrounding the implementation of an expulsion decision, and the decision of implementation itself, play a role in the application of Article 4 of Protocol No. 4 and must be considered as an additional requirement of its application.

63. This additional requirement, based on the very aim of Article 4 of Protocol No. 4, was enunciated in *Čonka v. Belgium* (no. 51564/99, § 63, ECHR 2002-I), the facts of which, together with this requirement, are appropriately discussed in the following passage from *Theory and Practice of the European Convention on Human Rights* (cited above, p. 956):

“In the *Čonka* Case the Court formulated an important additional requirement. The case concerned a group of Slovak gypsies who, pending their appeals against the refusals to grant asylum, were asked to report to the police station in order to ‘complete asylum request files’. However, upon their arrival at the police station removal orders were served upon them and a few hours later they were detained in a holding centre and subsequently removed to Slovakia. The Court held that the fact that a ‘reasonable and objective examination of the particular case of each individual alien of the group’ has taken place (as was the case here) does not mean that the circumstances surrounding the implementation of the expulsion decisions play no role in the determination of whether Article 4 has been respected. In this particular case the Court expressed doubts as to the legal basis for the manner in which the Belgian authorities had proceeded, also in view of the large numbers of individuals of the same origin that were concerned. These doubts were reinforced by a set of circumstances: the fact that the political authorities had announced beforehand that operations of this type would be held and had given instructions for them; the simultaneous convocation to report to the police station; the identical wording of the arrest and expulsion orders; the great difficulty for the persons concerned to contact a lawyer; and the fact that the asylum procedure had not been completed. The Court concluded [§ 63] that ‘at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account’.”

64. The interpretation of a legal provision according to its aim is particularly important in a convention such as the European Convention on Human Rights and the Protocols thereto, which are aimed at protecting human rights in a practical and effective manner. Because of this, such

interpretation, like that of Article 4 of Protocol No. 4, should go to the core or the heart of the right requiring protection, and it must therefore be broad and effective in terms of its above-mentioned object and purpose.

65. Collective expulsion of aliens merely on the basis of their nationality, as was the case in the present application, also offends against the principle of democracy, which is one of the fundamental principles of the Convention, specifically emphasised in its preamble. This principle does not allow or tolerate discrimination against aliens on the basis of their nationality. As has been said above, the prohibition of Article 4 of Protocol No. 4 is not only a prohibition of arbitrariness but also a prohibition of discrimination, in other words a prohibition of expulsion of aliens merely because they belong to a certain group. Collective expulsion can also be discriminatory because of its disproportionate character.

66. In conclusion, the guarantees of Article 4 of Protocol No. 4 are, firstly, the conduct of a personal interview, and secondly, protection from an expulsion decision, and its implementation, based merely on the ground of membership of aliens in a group, disregarding their personal circumstances; a two-fold test should therefore be applied.

67. In my view, neither of these guarantees was satisfied in the present case, since no interview was conducted and the expulsion of the applicants was carried out merely on the basis of their nationality, pursuant to the bilateral agreements between Italy and Tunisia.

68. Accordingly, there has, in my view, been a violation of Article 4 of Protocol No. 4.

#### **G. Whether there has been a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4**

69. I agree with the Chamber judgment (§ 172) that there has also been a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4.

70. It is clearly stated in the refusal-of-entry orders that: “The lodging of an appeal does not suspend the enforcement (*efficacia*) of the present order” (see paragraph 19 of the judgment). Consequently, the lodging of an appeal could not meet the requirement of Article 13 of the Convention for suspensive effect, as established by the case-law cited in the Chamber judgment (Chamber judgment, § 172).

71. In addition, according to the case-law, “the requirement under Article 13 that execution of the impugned measure be stayed cannot be regarded as a subsidiary aspect” (*ibid.*).

72. With all due respect to the majority, I disagree that the lack of suspensive effect of a removal decision, pending an appeal, in a collective expulsion case, does not, in itself, constitute a violation of Article 13, and that the criterion of suspensive effect of a removal order may depend on

whether the applicants allege that there is a real risk of a violation of their rights guaranteed by Articles 2 and 3 in the destination country (see paragraphs 277 and 281 of the judgment). This, ultimately, would mean that the suspensive effect of a removal order will be dependent on the discretion of the immigration authorities, to assess, in advance and before an appeal decision is taken, whether an alien has an “arguable” complaint that he or she faces a violation of Articles 2 or 3 of the Convention. However, even assuming that the above approach was correct, and the immigration authorities were convinced that there was a real risk of violations of rights guaranteed by Articles 2 and 3, the refusal-of-entry orders, based on the bilateral agreements between Italy and Tunisia, would probably remain unaffected, still prohibiting suspension of enforcement in the case of the lodging of an appeal.

73. The approach I would follow, which I believe is the correct one, is reinforced by the following *obiter dictum* of the Court in *De Souza Ribeiro v. France* ([GC], no. 22689/07, § 82, ECHR 2012):

“Lastly, the requirement that a remedy should have automatic suspensive effect has been confirmed for complaints under Article 4 of Protocol No. 4 (see *Čonka*, cited above §§ 81-83, and *Hirsi Jamaa and Others*, cited above, § 206).”

The above passage was an *obiter dictum* and not the *ratio decidendi* of the case, because the issue in relation to which it was stated was an issue of compliance with Article 13 of the Convention taken in conjunction with Article 8 of the Convention and not an issue of compliance of Article 13 taken in conjunction with Article 4 of Protocol No. 4. Still, like any other *obiter dictum* of the Grand Chamber, this one is of highly persuasive authority. The majority decided that this *dictum* “cannot be read in isolation”, but that “it must be understood in the light of the paragraph as a whole”, which deals with obligations arising from Articles 2 and 3 of the Convention. They also emphasised that the two cases referred to in the above *dictum* concerned Article 3 issues and not situations where there was any allegation by the applicants that their expulsion was collective in nature.

74. With due respect, I do not agree with the above reasoning. Though it is correct that the said *dictum* should not be read in isolation, it cannot, however, be understood only in the light of the paragraph (*De Souza Ribeiro*, § 82) where it is to be found, as a whole, but also in the light of the section where the paragraph is to be found, as a whole. This section is entitled: “*Compliance with Article 13 of the Convention taken in conjunction with Article 8*”. Accordingly, what is said in paragraph 82 in relation to compliance with Article 13 taken in conjunction with Articles 2 and 3 of the Convention and Article 4 of Protocol No. 4 is said *obiter*, because the relevant issue there was compliance with Article 13 taken together with Article 8. The meaning of paragraph 82, as I understand it, is that Article 13 of the Convention can apply in conjunction with (i) Article 2 of the Convention, (ii) Article 3 of the Convention, or (iii) Article 4 of

Protocol No. 4, independently and separately, without the latter depending on whether there is also an issue concerning Article 2 or Article 3. This is exactly the meaning of the word “Lastly” in the said passage which leaves no doubt on the matter. In *Hirsi Jamaa and Others* (cited above, § 207) it is clear that, regarding compliance with Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4, the Court does not subject an issue of Article 4 of Protocol No. 4 to an obligation under Article 3, but deals with them separately:

“The Court concludes that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 and Article 4 of Protocol No. 4 to the Convention.”

Moreover, the other case to which the *dictum* in question refers, namely *Čonka* (cited above), does not seem to support the view of the majority, in the light, *inter alia*, of the wording of paragraph 82 thereof (emphasis added):

“82. Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant *would be subjected to ill-treatment* in the country of destination *or be part of a collective expulsion*. In such cases, the remedy exercised by the applicant *would not be sufficiently effective* for the purposes of Article 13.”

75. I believe that, again, like the procedural obligation under Article 4 of Protocol No. 4, the said obligation under Article 13, when it applies in relation to Article 4 of Protocol No. 4, is mandatory and not qualified by any exception, this being the only safeguard against arbitrariness. Otherwise, it would not serve to ensure the mandatory nature of the procedural obligation of Article 4 of Protocol No. 4, as I believe it should do, or the principle of effectiveness of the Convention provisions, if Article 13 were not to have an automatic suspensive effect in respect of the enforcement of a removal order, taken under Article 4 of Protocol No. 4.

76. Finally, the procedural right guaranteed in Article 4 of Protocol No. 4 would lose its requisite protection, if under Article 13 a removal order did not have an automatic suspensive effect where an appeal is lodged.

#### **H. Award in respect of non-pecuniary damage for the violations of Article 4 of Protocol No. 4 and of Article 13 of the Convention taken together with the former Article**

77. My findings set out above, that there have been violations of Article 4 of Protocol No. 4 and of Article 13 of the Convention taken together with the former Article, would have led to an increase in the



amount of the award in respect of non-pecuniary damage, the determination of which, however, could only be theoretical, since I am in the minority.